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Supreme Court of the United States

OCTOBER TERM, 1997

ALFRED RASO, ET AL.,

Petitioners,

v.

MARISA LAGO, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

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April 1998

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED FOR REVIEW.

Whether the United States Court of Appeals for the First Circuit erred when it refused to apply strict scrutiny to the classification of, and the subsequent withdrawal of a race-neutral statutory housing preference from, residents forcibly displaced from their housing by urban renewal, because "the former West Enders are almost all white," where that racial classification, and misapplication of a consent decree, served as the basis of the withdrawal of the housing benefit, and whether the above actions violated the Fifth and Fourteenth Amendment rights of Petitioners.

LIST OF PARTIES.

PETITIONERS: ALFRED J. RASO,
JOAN BELINSKI CALABRO
FRANK LEVINE
THEODORE RICHARD NEDD
on behalf of themselves and all other displaced persons from the West End of Boston, and THE OLD WEST END HOUSING CORPORATION.

RESPONDENTS: MARISA LAGO, Director of the Boston Redevelopment Authority, and THE BOSTON REDEVELOPMENT AUTHORITY; and Henry Cisneros, Secretary of the Department of Housing and urban development, and THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; and Thomas A. Menino, Mayor of the City of Boston, and THE CITY OF BOSTON; and Victoria L. Williams, Director of the Boston Fair Housing Commission, and THE BOSTON FAIR HOUSING COMMISSION; and Sandra Henriquez, Director of the Boston Housing Authority, and THE BOSTON HOUSING AUTHORITY; and Robert H. Kuehn, Jr., President of Keen Development Corporation, and as trustee of the LOWELL SQUARE NOMINEE TRUST, and KEEN DEVELOPMENT CORPORATION; and THE REVEREND MICHAEL F. GRODEN, Director of the Planning Office of Urban Affairs, Inc., and THE PLANNING OFFICE OF URBAN AFFAIRS, INC; and LOWELL SQUARE ASSOCIATES, JOINT VENTURE; and LOWELL SQUARE COOPERATIVE LIMITED PARTNERSHIP; and MARK MALONEY, President of Maloney Properties, Inc. and MALONEY PROPERTIES, INC.

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No. 97-

In The

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October Term, 1997

ALFRED RASO, ET AL.,

Petitioners,

v.

MARISA LAGO, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

Petitioners, Alfred Raso, et.al., respectfully pray that a Writ of Certiorari issue to review the decision entered by the Court of Appeals for the First Circuit, dated, January 27, 1998 (App. 18a-21a).

OPINIONS BELOW.

The consent decree of the United States District Court, *NAACP* v. *Jack Kemp*, Docket 78-850S, dated March 8, 1991 is attached hereto in Appendix A to the Petition for a Writ of Certiorari. The Amended memorandum and Order on Motion to Intervene by Old West End Housing Corp., et. al., dated June 21, 1996 is attached hereto in Appendix B to the Petition for a Writ of Certiorari.. The Memorandum and Order of Judge Wolf, entered on January 6, 1997 is attached hereto in Appendix C to the Petition for a Writ of Certiorari. The decision of the First Circuit Court of Appeals, dated January 27, 1998 is attached hereto in Appendix D in the Petition for a Writ of Certiorari.

JURISDICTION.

On January 27, 1998, the First Circuit Court of Appeals affirmed the decision of the District Court, dated, January 6, 1997.

Under 28 U.S.C. § 1254 this Court has jurisdiction to review the final judgment of court of appeals. "Cases in courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari . . ."

CONSTITUTIONAL PROVISIONS INVOLVED.

This case involves portions of the Fifth and Fourteenth Amendments to the United States Constitution.

> . . . nor be deprived of life, liberty, or property, without due process of law; nor shall

> private property be taken for public use, without just compensation.

U.S. Constitution, Amendment 5.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment 14.

STATUTES INVOLVED.

The statute involved is Massachusetts General Law, c. 121B, §§ 49 (c) & (d).

STATEMENT OF THE CASE.

In 1959, as part of an urban renewal project, the City of Boston took title by eminent domain to a large area of land in Boston known as the West End. Approximately three thousand families were forcibly displaced from their homes by government action in an urban renewal scheme described by one federal judge as "carried out in the tradition of General

Sherman's urban renewal of Atlanta."[1] The residents displaced were a largely immigrant community.

Recognizing an obligation to the displaced families, the Massachusetts State Legislature imposed certain land use restrictions and tenant preferences in dwelling units constructed on land formerly of the West End. In 1969 the state legislature recodified the provisions of law which dated back to 1946, and incorporated the long-standing covenants regarding land use restrictions and housing preferences for families displaced by urban renewal into what is now codified as M.G.L. c. 121B, § 49(c) and § 49(d).

Section 49(c) mandates that when housing is constructed in the project area, a preference shall be given to families displaced therefrom. Section 49(d) says that housing offers will

> comply with such other conditions as are deemed necessary to carry out the purposes of this chapter, or requirements of federal legislation or regulations under which loans, grants or contributions have been made or agreed to be made to meet a part of the cost of the project.

This requirement is passed on to successive title holders.

In 1986, the Boston Redevelopment Authority, the government entity created by state statute to undertake urban renewal projects, awarded development of a certain parcel of urban renewal land, which is now known as West End Place, to Lowell Square Cooperative Limited Partnership. The Lowell Square group, along with the Department of Housing

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[1] *NAACP, Boston Chapter* v. *Henry Cisneros,* C.A. 78-850-WJS June 12, 1996.

and Urban Development, and the Boston Redevelopment Authority, are Respondents in this case.

In 1991 the NAACP, Boston Chapter, entered into a consent decree with HUD, regarding publicly assisted housing programs in the city of Boston. *NAACP, Boston Chapter* v. *Kemp*, No 78-850, slip op (D-Mass, March 8, 1991) (App. 1a). The decree ha[illegible] a sunset clause of March 8, 1996 (App. 15a-16a). The decree mandated adoption of Affirmative Fair Housing Market Plans (AFHMP) which

> shall have as their goal and measure of success the achievement of a racial composition, in HUD-assisted housing located in neighborhoods which are predominantly white, which reflects the racial composition of the City [of Boston] as a whole.

(App. 3a.)

On June 21, 1996, Petitioners in this case sought to intervene in the case which was the genesis of the Affirmative Fair Housing Marketing Plan at issue, but the court refused to grant standing.

> The disposition of particular parcels of real estate [of which West End Place was one] was never considered. For the intervenors [] to achieve the result they seek would require the joining of several government entities as parties. A number of new legal theories would have to be considered . . . These issues bear no relationship to this case.

NAACP v. *Cisneros*, 78-850 WJS, (June 21, 1996 Skinner J.) (App. 21a). "This case is for all practical purposes closed." *Id.*

On September 26, 1997, a complaint was filed by Petitioners in federal district court seeking class certification and preliminary and injunctive relief, and a declaratory judgment on behalf of Petitioners against the Respondents. The complaint raised six counts: (1) that urban renewal displacees were entitled, as a matter of law, to an absolute right of return to units at West End Place; (2) that M.G.L. c. 121B, § 49 impressed on the land a trust, and displacees, as beneficiaries of that trust, were entitled to equitable/beneficial and property interests; (3) that defendants acting under color of law, purposefully interfered with and denied plaintiffs of their statutory and property rights, and their civil, due process and equal protection rights in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983; (4) that defendants, acting under color of law, interfered with plaintiffs' statutory preference conferred by state statute, and interfered with and denied plaintiffs of their rights of due process and equal protection under the Fifth and Fourteenth amendment to the United States Constitution, and 42 U.S.C. § 1983; (5) that defendants had engaged in discriminatory housing practices in violation of the Federal Fair Housing Act, 42 U.S.C. § 3604(b); and (6) that defendants violated plaintiffs rights under 42 U.S.C. § 2000(d), subjecting plaintiffs to racial discrimination under a program receiving federal financial assistance.

On January 6, 1997, the district court dismissed without prejudice the plaintiffs' claims under the Equal Protection Clause of the Fourteenth amendment, Title VI of the Civil Rights Act of 1964, and Title VIII of the Civil Rights Act of 1968. In its subsequent order of February 11, 1997, the dis-

trict court reaffirmed its earlier dismissals without prejudice of the foregoing claims, and dismissed all other claims asserted in plaintiffs' complaint with prejudice. Judgment was ordered to enter for the defendants on all counts.

On April 23, 1997 Petitioners filed an appeal with the United States Court of Appeals for the First Circuit, raising the same claims, arguing that the district court erred when it applied a lesser level of scrutiny to the reduction of statutory rights based on race, applying *Metro Broadcasting Inc.* v. *FCC*, 497 U.S. 547 (1990). This, the Petitioners argue, is in contravention to the holding in *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995), which specifically overruled *Metro* on the issue of strict scrutiny and "benign" racial classifications. Also raised was the inappropriate application of the consent decree to the facts of this case.

On January 27, 1998, a majority of a three judge panel of the First Circuit ruled on two claims:

> a claim under 42 U.S.C. §1983 -

(App. 71a), and

> a claim that [G.L. c. 121B] section 49 creates a trust that subjects the BRA and developer to a trustees fiduciary duties in favor of former West Enders.

Id.

The dissent argued that

> a reasonable inference [can] be drawn from plaintiffs' complaint . . . the defendants acted

> as they did because the putative plaintiff class was predominantly white. The fact that defendants 'do not dispute' this accusation [] only underscores our obligation to subject defendants' conduct to strict scrutiny.

(App. 80a.)

The Petitioners preserve and press all federal and property/trust arguments with this Court.

REASONS FOR GRANTING WRIT.

A majority panel of the United States Court of Appeals for the First Circuit upheld a lower court's decision, affirming the Department of Housing & Urban Development's reasoning that the need to "increase minority opportunities" (App. 72a) in federally assisted housing programs, even when founded on "undenied racial motive[s]" *id.*, not only outweighs the statutory right of return and equal protection claims of families uprooted from their homes by urban renewal, but is not subject to strict scrutiny analysis, because those displaced by urban renewal "are almost entirely white". *Id.* (*Also*, at App. 48a.)

The dissent argued that strict scrutiny should have been applied to the government's race-based policy:

> The Supreme Court has squarely rejected the argument that classifications motivated by 'benign' considerations should not be scrutinized strictly. See *Adarand*, 515 U.S. at 226. And though this case does appear unique in

> that the government conduct at issue is more a withdrawal of a special benefit from whites than a giving of special benefits to members of minority groups, the clear import of *Adarand* is that it is the plaintiffs' 'personal right to equal protection of the laws,' 515 U.S. at 227, and not some non-party's interest in competing for that which would be the plaintiffs' but for his or her race, that is constitutionally safeguarded. Thus, in evaluating the constitutionality of defendants' conduct, we must not look to its effect and motivation with respect to others; we must look at its effect and motivation with respect to plaintiffs. And here, quite clearly, defendants conduct has had the effect of depriving plaintiffs of a benefit and was promoted by the fact that plaintiffs are mostly white."

(App. 82a-83a)

The Circuit's abdication of its overriding obligations, post *Adarand*, to apply strict scrutiny to race-based governmental actions based on the racial categorization of the Petitioners as a group, puts it on a collision course with this Court's controlling precedent. The decision also creates conflict with rulings in other circuits which have adopted the strict scrutiny standard when reviewing racial classification, even those formerly held to be "benign". *Lutheran Church, Missouri Synod* v. *F.C.C.*, 1998 WL 168712, *9; Slip op. No. 97-1116 (D.C. 1998) ([W]e do not think it matters whether a government hiring program imposes hard quotas, soft quotas, or

goals . . . Strict scrutiny applies)[2]. *Hopwood* v. *Texas*, 78 F.3d 932 (5th Cir. 1996) *cert. denied* 116 S. Ct. 2581 (1996) ([c]ourts are to employ strict scrutiny when evaluating all racial classifications) at 940. *In re Birmingham Reverse Discrimination Emp. Lit.*, 20 F.3d 1525 (11th Cir. 1994), *rehearing denied*, 20 F.3d 1525 (11th Cir. 1994), *cert. denied* 115 S. Ct. 1695 (1995) ([s]trict scrutiny is the standard of review to be applied to all claims of race-based discrimination) at 1536.

The Circuit panel noted that it was deciding the appeal, "based on Supreme Court precedent, as best we can discern it," (App. 78a) over an area "on the edge of developing law." *Id.* The Circuit's stated uncertainty over controlling precedent underscores the need for this Court to reestablish the right of citizens to equal protection of the laws as guaranteed by the Equal Protection Clause of the United States Constitution, and previous decisions of this Court.

Such disregard for the equal protection claims of citizens, because they are white, is constitutionally impermissible, and sets a troubling precedent by both an agency of the federal government and the First Circuit. The decision from this Cir-

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[2] Recently, the United States Court of Appeals for the District of Columbia handed down a decision in which the Department of Justice and the FCC unsuccessfully argued that strict scrutiny should only be applied where the government "establishes preferences, quotas, or set-asides". That Circuit rejected the government's argument that the

> FCC's program should be regarded as if it did no more, or not significantly more, than seek non-discriminatory treatment of women and minorities.

The government's unpersuasive argument in the D.C. case was the very argument accepted by the First Circuit in Petitioners' case.

cuit which permits these violations should be set aside. The proper standard of review for any racial classification is not only far from "uncertain" as the Circuit panel stated, it was not applied properly by the court below.

I. THE RESPONDENTS HAVE UNCONSTITUTIONALLY DEPRIVED CITIZENS OF RIGHTS BASED ON RACE, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT, AS WELL AS FEDERAL FAIR HOUSING AND CIVIL RIGHTS LAWS.

A. *The Inappropriate Application of a Racial Classification is Openly Acknowledged and May be Discerned by Referring to the Circuit's Own Words.*

The Circuit summed up the Petitioner's argument succinctly:

> West Enders allege that race was a motive for curtailing the statutory preference otherwise available to them.

(App. 71a.)

> [T]he defendants do not dispute that racial concerns and the consent decree prompted their effort to cut back upon the statutory preference.

Id. at 72a.

Race was a factor in abolishing the preference. As the majority of the Circuit panel viewed it,

> the former West Enders are almost entirely white, and without some limitation on the preference rights of former West Enders, HUD would have been funding subsidized apartments from which minorities were effectively excluded.

Id. at 72a.[3] The dissent argued that race was a factor; "defendants acted as they did because the putative plaintiff class was predominantly white." *Id.* at 80a.

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[3] Even if the class was "predominantly minority" as opposed to being "predominantly white" *See Otero* v. *New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973), the classification would still have to be reviewed under strict scrutiny. *See Shaw* v. *Reno*, 509 U.S. 630 (1993) (Slip op. 19) ("Indeed, racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.") Moreover,

> [t]he suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, *Plessy* v. *Ferguson* (citation omitted). This idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree. *Loving* v. *Virginia* (citation omitted).

Powers v. *Ohio*, 499 U.S. 400, 410 (1991).

The use of race was clear to the majority as well. It openly acknowledged that HUD's

> purpose to increase minority opportunities for apartments in West End Place by curtailing the statutory preference is evident.

Id. at 72a.

> This undenied racial motive distinguishes this case from those involving facially neutral actions . . .

Id.

> But the plaintiffs are mistaken in treating 'racial motive' as a synonym for a constitutional violation.

Id. at 72a-73a.

> [T]he government's condition on federal funds was that some of the apartments — which otherwise would have almost automatically been occupied by whites — be made available to all applicants on a race-blind basis.

Id. at 74a.[4]

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[4] It is important to note how the Circuit seriously misstates this very important point. The Circuit says:

The dissent disagreed,

> The fact that defendants 'do not dispute' this accusation, *ante* at 11, only underscores our obligation to subject defendants' conduct to strict scrutiny.

Id. at 80a.

> [U]nder the plan adopted in this case, the apartments freed from the statutory preference are made available to all applicants regardless of race.

(App. 73a). It adds,

> [i]t might not seem remarkable that the government should insist, as a condition of [its] investment, that a fair number of the apartments should be effectively open to application by tenants of all races.

(App. 74a.) If that was all that occurred in this case, there would be no issue. Petitioners, stated from the start that the apartments should be affirmatively marketed to all residents displaced by urban renewal. In fact, Petitioners engaged in an aggressive affirmative housing outreach program to minorities displaced by urban renewal. This case is not about Petitioners' refusal to affirmatively market housing, rather it is about the lower courts' insistence, that the result of that effort, did not produce enough minorities.

> It would obviously be a charade to affirmatively market the units at West End Place to attract minority applicants and then give former West End residents an absolute preference to all those units because the vast majority of them are white.

(App. 48a.) Because of this, the absolute preference was destroyed, thus giving lie to the idea that the AFHMP was not a quota.

What the majority neglects to note is that the apartments freed from the statutory preference were freed because there were too many whites entitled to them. The discrimination occurred not at the end, but at the beginning of the process, when the pool of qualified applicants was reduced from 100% to 55% because of the color of their skin. This racial classification is not a synonym for unconstitutional discrimination, it is a paradigm of it. In the absence of strict scrutiny, it cannot stand as a justification for the withdrawal of the Petitioners statutorily conferred benefits.

Moreover, it has never been contended by the Respondents that the statute granting the right of return was in any way racially discriminatory. As the dissent observed,

> It is important to note that there is no indication that the benefit originally given (i.e., the full preference) was given to plaintiffs because they were predominately white; rather, the preference was given because plaintiffs were ousted from their homes.

(App. 82a, n.9.)

In *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion) this Court reviewed a remedial "plan [which] denie[d] certain citizens the opportunity to compete . . . based solely on their race," and found the plan violative of the equal protection guarantees of the constitution. Following *Adarand*, the Fifth Circuit in *Hopwood* at 934 reviewed a school admissions policy whereby

> with the best of intentions, in order to increase the enrollment of certain favored classes of

> minority students, the University of Texas School of Law [] discriminates in favor of those applicants by giving substantial racial preference in its admissions program,

and examined

> whether the Fourteenth Amendment permits the school to discriminate this way.

This Court concluded, it does not. *Hopwood* at 934 *citing Croson*.

The majority of the Circuit panel in the present case noted that the Respondents' cut-back of the statutory preference was to ensure greater minority participation.

> [I]ts purpose [was] to increase minority opportunities for apartments in West End Place by curtailing the statutory preference.

Id. 72a. This is similar to the situation addressed by this Court in the case of *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986) (plurality decision) where this Court stated:

> [t]he Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of Equal Protection Clause.

Id. at 283-84. The withdrawal of a race-neutral statutory benefit, because the race of those receiving the benefit is predominantly white, cannot satisfy the demands of equal protection, even if the purpose of the action is to accomplish a desired social goal.

II. Both Remedial and Benign Racial Classification are Entitled to be Viewed by a Court Under Strict Scrutiny.

The majority of the Circuit panel misconstrued the curtailment based on race as benign, and subject to something less rigorous than strict scrutiny.

> Benign intentions do not immunize government action, but they substantially narrow the inquiry.

(App. 73a.) The majority erred in ruling as it did in this case. This error was addressed by the Dissent, *Id.* at 81a.

> Government action which subordinates race neutral considerations to an overriding racial purpose, is constitutionally suspect.

Citing, Miller v. *Johnson,* 515 U.S. 900, 913 (1995), *also citing, Shaw* v. *Reno*, 509 U.S. 630 (1993). *Also see, Croson* at 500 (the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight.)

Indeed, the very purpose of strict scrutiny

> is to 'smoke out' illegitimate uses of race by assuring that the [] body is pursuing a goal important enough to warrant the use of a highly suspect tool.

Croson, at 493. That the majority of the Circuit panel accepted the government's stated purpose as benign is no reason to ignore Petitioners claim that it was racial discrimination for discrimination's sake.

> [A]ll racial classification, imposed by whatever federal, state or local government actor, must be analyzed by a reviewing court under strict scrutiny.

Adarand at 115 S. Ct. at 2113-114. This did not happen.

The majority disagreed, writing, "We cannot view this as a 'racial classification . . ." reserving benefits for a favored class. (App. 74a-75a), even though it acknowledged that its decision was based on the racial membership of the statutorily protected group (App. 72a-73a, 75a, n.8).

The dissent correctly noted,

> it is settled that, when the government withdraws benefits from a class of citizens because of the race or ethnicity of the class, courts are to scrutinize the government's conduct so as to ensure that it furthers a compel-

> ling governmental interest and is narrowly tailored to achieve that interest.

(App. 79a.)

III. A Race-Neutral Statute Which Bestows a Benefit on One Class of Deserving People is Not Presumptively Unfair or Unconstitutional Unless the Reason for its Existence is to Exclude Based on Race.

The dispute centers around the manner in which federal fair housing law and regulations were applied to a race-neutral statute, M.G.L. c. 121B, §§ 49(c) & (d) which guaranteed a preference in housing to families displaced from their homes by urban renewal. Section 49(d) did not have to be applied to § 49(c) to destroy the statutory preference, since it could just as easily have been applied to ensure that housing offers were made in a non-discriminatory fashion.

The state statute reads:

> If an urban renewal agency shall sell or lease any property acquired by it for an urban renewal project, the terms of the sales or leases shall obligate the purchasers or lessees, a) to devote the land to the use specified in the urban renewal plan for said land; b) to begin the building of their improvements within a reasonable time; provided, however, that, with respect to any improvements of a type which any federal agency, as defined in subsection B

> of section 3 of the Federal Property and Administrative Act of 1949, as amended, is otherwise authorized to make, this clause shall apply to such federal agencies only to extent that it is authorized, and funds have been made available, to make the improvements involved; (c) to give preference in the selection of tenants for dwelling units built in the project area to families displaced therefrom because of clearance and renewal activity who desire to live in such dwelling units and who will be able to pay rents or prices equal to rents or prices charged other families for similar or comparable dwelling units built as part of the same development; (d) to comply with such other conditions as are deemed necessary to carry out the purpose of this chapter, or requirements of federal legislation of regulations under which loans, grants or contributions have been made or agreed to be made to meet a part of the cost of the project.

The Circuit failed to address the case law in Plaintiffs' appeal, notably: *Personal Administrator of Massachusetts et al.* v. *Helen Feeney*, 442 U.S. 256 (1979), *citing Washington* v. *Davis*, 426 U.S. 229 (1976) (a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact; instead the disproportionate impact must be traced to a purpose to discriminate on the basis of race). *Id.* at 238-44. As this Court noted,

> As an initial matter, we have difficulty understanding how a law establishing racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups.

Id. at 245.

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and the average black than to the more affluent white.

Id. at 248. In the *Washington* case, this Court went back over 100 years of case law, and concluded that "the rule is the same in other contexts." *Id.* at 240, citing *Strauder* v. *West Virginia*, 100 U.S. 303 (1880)

In this context, the rationale adopted by the majority of the panel, namely, that because the majority of urban renewal displacees were white, the race-neutral statutory right of return had to be abolished to achieve greater minority partici-

pation, is both unpersuasive and lacking in any constitutional merit.[5]

Racial exclusion is the quiet predicate in the majority's affirmation of the lower court's decision. The majority gave no citation to either case law, federal law or regulation which did anything other than mandate providing fair housing opportunities and affirmative outreach to both majority and minority communities. Nowhere in federal fair housing law, or in this Court's controlling precedent, is there a mandate to deny citizens of constitutionally protected rights to achieve greater diversity.

There is no case law supporting the novel proposition adopted by the majority of the Circuit panel in this case, that strict scrutiny need not be applied to a policy which excludes Petitioners because, as the trial judge noted, "the vast majority of them are white." (App. 48a.)

A. *Petitioners' Firmly Held and Settled Expectation of Housing Did Not Have to be Uprooted.*

Petitioners' legitimate and firmly held and settled expectations of housing, did not have to be uprooted to ensure that housing offers comply with federal fair housing mandates.

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[5] Indeed, the Fifth Circuit in *Hopwood*, saw

> the case law as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of other factors, is unconstitutional.

78 F.3d at 945-46. "No case since Bakke has accepted diversity as a compelling state interest under strict scrutiny analysis." *Id.* at 944.

The federal mandates of § 49(d) could have been directed toward the group to whom the statutory preference was granted in § 49(c), to ensure that offers of housing did not exclude anyone based on race. This reading would have avoided the constitutional question, and ensured equal housing opportunity in a race-neutral fashion to residents displaced by urban renewal. As noted above, West Enders and the developer conducted an aggressive outreach program to attract displaced minority West Enders to the project.

It is a long-standing fundamental precept of statutory construction that

> [w]hen the validity of an act . . . is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principal that [the] Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Crowell v. *Benson*, 285 U.S. 22, 62 (1932).

In the present case, the Circuit intruded upon a race-neutral statute's right-of-return, and issued a decision that compels the application of the Fourteenth Amendment requirement of strict judicial scrutiny.

IV. A Consent Decree in Which HUD Agrees to Affirmatively Market Federally Subsidized Units to Minorities Until the Percentage of Minorities in White Neighborhoods Equals the Percentage of Minorities in the City of Boston as a Whole Need Not Have Diminished the Statutory Rights of Citizens to Relocation; and Should Have Been Modified to Determine if its Mandate Was Justified Under Current Precedent.

A. *As Applied, the Consent Decree Was Structurally Overbroad, and Constitutionally Suspect, Post Adarand.*

Both HUD and the lower courts viewed opposition to the Affirmative Fair Housing Marketing Plan (AFHMP) as opposition to the application of the consent decree in this case. The consent decree, obligated HUD to provide subsidized housing access to low income minority households throughout the metropolitan Boston area (App. 3a) and "to Black persons in neighborhoods which are now predominantly white" within the city of Boston. *Id.* at 9a. All AFHMP plans "shall have as their goal and measure of success the achievement of a racial composition, in HUD-assisted housing located in neighborhoods which are predominantly white, which reflects the racial composition of the City as a whole. Nothing herein shall constitute or be construed as requiring a quota." *Id.* at 3a-4a.

The over-breath of the remedy extending to a generalized class over an indefinite period of time, imposes the kind of impermissible burdens on others which violate their constitutional rights, and which a reviewing court is bound to ad-

dress. Suitably tailored modifications are a necessity in such cases.

Confronted with the obligation to review what the decree ordered and did, the lower courts in this case, chose to allow the decree to intrude on the constitutional rights of innocent third parties, and bestow benefits meant for others on individuals who were neither displaced families, members of a minority class the decree sought to benefit, and in some cases not even residents of Boston.

Compare the broad application and overreach of the AFHMP in this case to the narrow tailoring this Court articulated in *Croson* at 499.

> But where special qualifications [being a West Ender displaced by urban renewal] are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. (Citation) In this case, the city does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction projects.[6]

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[6] Although the consent decree is heavily weighted on the basis of race, the majority says it was not. *See Raso* (App. 73a)

> ("Yet under the plan adopted in this case, the apartments freed from statutory preference are made available to all applicants regardless of race.")

This interpretation conveniently downplays the overriding fact that the race-neutral right of return guaranteed by state statute was withdrawn because of the race of the displaced families.

The plain language of the consent decree would suggest a structural overreach which runs afoul of the narrow tailoring this Court has required in such cases. What Respondents' have done is put the judicial restraints of this Court aside, and determined that discrimination against those who do possess the necessary race-neutral qualifications for housing, is permissible if the group to whom the benefits may fall is predominantly white.[7]

B. *Discussion Why Consent Decree as Applied is Constitutionally Offensive.*

The Circuit panel invoked the consent decree as one of its reasons for the withdrawal of statutory benefits due displaced West Enders (App. 7a).

The consent decree was improperly applied.

First, the consent decree contained a sunset clause which expired on March 8, 1996. *See Kemp* (App. 15a).

Second, had the consent decree still been in effect, it would have been improperly applied under this Court's holding in *Martin* v. *Wilks*, 490 U.S. 755 (1989) (*i.e.*, to apply the consent decree to the detriment of third parties who were not part of the action that gave rise to the decree, and

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[7] We note that although the NAACP has refused to seek a lifting of its terms, the court, in clear frustration with the inability of the parties to wean themselves from its requirements, stated, "This case is for all practical purposes closed." (App. 21a.) Nothing in the consent decree obligates HUD to do more than affirmatively market units to attract minority participation in HUD-assisted units. This mandate could have been undertaken with due regard for the interests of the class of citizens the state statute sought to protect. It did not have to be applied in such a way as to decimate that right, and bring both federal regulations and the consent decree into conflict with constitutional protections.

who did not have reasonable opportunity to present objections to such order, and who lacked actual notice sufficient to apprise them that such order might affect their interests, and whose interests were not adequately represented by another person who challenged the decree.) (*See* App. 21a, "The disposition of certain parcels of real estate was never considered.")[8]

In *Martin* v. *Wilks*, this court held that it

> contravenes the general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party.

Martin, 490 U.S. at 759.

> All agree that '[i]t is a principle of general application in Anglo-American jurisprudence

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[8] We assert and reiterate that the taking away of the right of return to apartments at West End Place was an unlawful taking of a firmly held and settled property interest under the Fifth Amendment, and that the statute imposing the obligation to protect this right rose to the level of a trust obligation, as the elements necessary for creation of a trust were present in this case.

> The interest of the beneficiary may be future interest, vested or contingent; may rest solely in the discretion of the trustee; it may be limited to the occupation of the trust property . . .

Loring, A TRUSTEE'S HANDBOOK, Rounds/Hayes, 1996 Edition, pp. 66-68, The Beneficiary's Property Interest, § 5.3.1. Nature and Extent of Property Interest. *See also, Faraks* v. *Williams*, 5 Ill.2d 417, 422-23 (1955) (*Citing* 4 Powell, THE LAW OF REAL PROPERTY, at 87.)

> that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.

Martin, 490 U.S. at 761-762, *quoting Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940). The displaced West Enders were not only not party to *NAACP, Boston Chapter* v. *Kemp*, but when plaintiffs tried to intervene in further proceedings regarding the effect the consent decree might have on their status as displaces, the court declined their intervention and recommended that they file a new case, which they here have. *Id.* at 21a.

Third, the purpose offered by Respondents for their use of race-based decision making, that they were complying with the consent decree, would not survive an Equal Protection challenge. To survive such a challenge, HUD would first have to meet the burden of production it bears as a governmental defendant. It would need to produce evidence that compliance with this consent decree is a compelling governmental interest, and that the withdrawal of the race-neutral statutory right of return was narrowly tailored to meet that compelling interest.[9] The Eleventh Circuit held that

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[9] Since Petitioners' case was dismissed by the District Court before trial (summary judgment was granted), the District Court should have required the defendants to meet its burden before entering a judgment in their favor.

> [T]he proponent of the measure must demonstrate a 'strong basis in evidence for its conclusion that remedial action [is] necessary.'

merely because a consent decree has judicial approval does not reduce the level of judicial scrutiny that policies adopted under it's auspices are subject to.

> [W]e perceive 'no reason for treating a consent decree entered pursuant to a voluntary settlement differently from a voluntary affirmative action plan.'

In re Birmingham Reverse Discrimination Employment Litigation, 20 F.3d 1525, 1534 (11th Cir. 1994), *rehearing denied* 20 F.3d 1525 (11th Cir. 1994) *cert. denied* 115 S.Ct. 1695 (1995) *quoting In re Birmingham Reverse Discrimination Emp. Lit.*, 833 F.2d at 1501 (11th Cir. 1987), *aff'd sub. nom. Martin* v. *Wilks*, 490 U.S. 755 (1989).

Fourth, if the decree is held to be in effect, and applicable to displaced West Enders, changes in the law and factual conditions warrant a revision of the *Kemp* consent decree.

> A consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law. But modifications of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent.

Podberesky v. *Kirwan*, 38 F.3d 147, 153 (1994), *quoting Croson*, 488 U.S. at 500.

Robert C. Rufo, Sheriff of Suffolk County, et al. v. *Inmates of the Suffolk County Jail, et. al.*, 502 U.S. 367, 387 (1992).

Lastly, this consent decree was entered into four years before this Court mandated strict scrutiny for all federal race-based policies.

CONCLUSION.

Petitioners pray that certiorari should issue.

Respectfully submitted,

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APPENDIX A.

APPENDIX A EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

N.A.A.C.P., BOSTON CHAPTER,	)	
Plaintiff,	)	CIVIL ACTION No. 78-850-S
v.	)	(Skinner, J.)
JACK KEMP, Secretary of Housing and Urban Development, et al.,	)	
Defendants.	)	

CONSENT DECREE

WHEREAS, both the plaintiff and the defendants (Hereinafter "the parties") have appealed from this Court's Declaratory Judgment and Final Decree, dated June 23, 1989, as amended by this Court's Clarification and Amendment of judgment, dated September 14, 1989 (1st Cir., Nos. 89-2100, 90-1458);

WHEREAS, all parties would like to resolve the concerns underlying their appeals, rather than have them adjudicated by the Court of Appeals;

WHEREAS, the Executive Office of Communities and Development of the Commonwealth of Massachusetts has entered into an agreement with the federal defendants in lieu of the requirements set forth in Section II.B of the Final Decree, to become effective upon the Court's approval of this Consent Decree;

WHEREAS, pursuant to an agreement between the City of Boston ("the City") and the U.S. Department of Housing and Urban Development ("HUD") (a copy of which is attached hereto as Exhibit A), the City has agreed to withdraw its Petitions for Review (1st Cir., Nos. 89-2182 and 90-1958) challenging the imposition of fair housing conditions by HUD on Community Development Block Grants received by the City without first following the procedures specified in 42 U.S.C. § 5311 and the City has elected to be bound by the terms of this Decree;

WHEREAS, the plaintiff has agreed to withdraw its appeal (1st Cir., No. 90-1458) upon the Court's approval of this Consent Decree; and

WHEREAS, the defendants have agreed to withdraw their appeal (1st Cir., No. 89-2100) upon the Court's approval of this Consent Decree and understanding that the terms of this Consent Decree shall contain the defendants, sole obligations during the term of this Decree:

Exhibit C

The parties to the above-captioned case have agreed to the following Decree to replace Sections II - IV of the Declaratory Judgment and Final Decree, dated June 23, 1989, and this Court's Clarification and Amendment of Judgment, dated September 14, 1989, which are vacated.

II.

A. Metropolitan Area Relief

1. HUD shall require, by adding terms to grants or contracts entered into or amended on or after June 23, 1989, owners and managers of HUD-assisted projects within any city or town within the Boston Metropolitan Statistical Area, including Boston ("the Metropolitan Area"), to participate fully in available programs designed to facilitate access to suburban housing opportunities for low-income minority households now living in the City. These programs shall include, without limitation, Section 8 rental subsidies and the listing requirements created pursuant to Section II.B. of this Decree. HUD-assisted projects are defined as all rental housing of five or more units receiving HUD mortgage insurance and all other housing the cost of whose purchase, development, operation or rehabilitation is subsidized in whole or in part with HUD funds or resources in addition, the affirmative fair housing marketing plans designed pursuant to applicable HUD regulations by owners and managers of HUD-assisted project-based housing (i.e. non Section 8 Existing Certificate and voucher Programs) as defined in this subsection, located in the City of Boston, shall have as their goal and measure of success the achievement of a racial composition, in HUD-assisted housing located in neighborhoods which are predominantly white, which reflects the ra-

cial composition of the City as a whole. Nothing herein shall constitute or be construed as requiring a quota.

The requirements of this Decree shall not apply to housing whose only HUD assistance is a) mortgage insurance or property improvement loan insurance (Title I) for one-to-four family homes, pursuant to 22 U.S.C. § 1702 et seq.; b) funded pursuant to Title I of the 1974 Housing and Community Development Act or other similar entitlement program, if not located in the City of Boston; or c) to assistance provided by the Public Facilities Department of the City of Boston ("PFD") through its Homeowner Services and Senior Home Repair Programs. Moreover, the requirements of this Decree shall apply to Public housing agencies ("PHAs") funded by the U.S. Housing Act of 1937 only to the extent set forth below in section II.A.3 of this Decree. In connection with any grant, contract or amendment for assistance entered into on or after June 23, 1989, HUD shall use any power it possesses to impose the conditions of Section II.A of this Decree.

2. HUD shall engage in efforts, through a public information program using, for example, media advertising and community and social service organizations, to encourage owners and managers of housing in the Metropolitan Area to participate fully in the Boston Housing Opportunity Clearing Center established pursuant to Section II.B of this Decree.

3. HUD shall also require, by adding terms to Annual Contributions Contracts entered into or amended on or after June 23, 1989, that each PHA located in the Metropolitan Area submit to the Boston Housing Opportunity Clearing Center established pursuant to Section II.B of this Decree

information advising interested persons of its application and selection policies and waiting list procedures for federally-assisted public housing. These PHAs will also be required to submit to the Boston Housing Opportunity Clearing Center, at least two weeks in advance, notification of the reopening of any previously closed public housing waiting list.

4. Where HUD is legally obligated to enter into a grant agreement, contract or amendment and lacks the authority to refuse to enter into such grant agreement, contract or amendment and the owner or PHA refuses to accept the conditions specified in Sections II.A.1 or II.A.3, then HUD can execute such grant agreement, contract or amendment without those conditions.

B. Fair Housing Conditions Upon Funding to the City

Following entry of this Decree, HUD shall include. in any approval of an application for funding by the City, under any grant or other program administered by HUD pursuant to which it has the power to impose conditions upon grantees or recipients, the following conditions:

1. That, commencing no later than six weeks from the effective date (as defined in Section V of this Decree), the City require the owners and operators of any City-assisted, public or private, housing available for rental or sale to participate fully in programs designed to enhance access to low-income housing by low-income Black households, including but not limited to Section 8 rental subsidies and the listing and affirmative marketing programs created pursuant to Section II.B.2 of this Decree. "City-assisted housing" means housing the cost of whose purchase, development, operation or reha-

bilitation is subsidized in whole or in part with city funds or other resources. Financial assistance includes, without limitation, the donation or sale of city-owned land. However, it is not intended that "other resources" be defined to include any provision of municipal services such as police or fire protection or tax abatements, easements, variances or other zoning decisions granted or made by the City of Boston. This provision does not apply to assistance provided by PFD through its Homeowner services and Senior Home Repair Programs. Moreover, the requirements of this Decree shall apply to the Boston Housing Authority only to the extent set forth in Section II.A.3 of this Decree.

2. Within sixty days of the effective date (as defined in Section V of this Decree), the City will implement a Fair Housing Program approved by HUD, to be administered by the Boston Fair Housing Commission ("BFHC"), including, without limitation, the following components:

a. A Boston Housing opportunity Clearing Center, in which shall be listed 1) all public or private housing units available for sale or rental in the Metropolitan Area which are required to be listed by Sections II.A or II.B.1 of this Decree; 2) all public or private housing units available for sale or rental in the Metropolitan Area which are required to be listed by the Commonwealth of Massachusetts; or 3) any private units which are voluntarily offered for listing by their owners or operators;

b. A Fair Housing Law Enforcement Program, designed to identify and alleviate racially discrimina-

tory practices in the sale and rental of housing in the City, which shall, without limitation:

(i) Hear and investigate complaints of discriminatory practices;

(ii) Bring such administrative and judicial proceedings against persons engaging in discriminatory practices as are within the City's legal authority and with respect to any administrative or judicial proceedings that are beyond the City's legal authority, the City shall refer such cases to all other agencies (state, federal and private) that have the authority to bring such proceedings and shall cooperate with each such agency with respect to such proceedings, as well as cooperate with persons who complain of discriminatory practices in instituting and prosecuting private claims; and,

(iii) Assist victims of discrimination by providing information as to rights and available remedies, and referrals to legal services organizations and private attorneys available to assist in discrimination claims.

c. That the City engage in good faith lobbying of the State legislature to enact legislation giving enforcement powers to the BFHC, including but not limited to the power to levy fines and institute civil actions, with the City's obligation hereunder to continue until the State's enactment of such legislation. These efforts will include advocating for the bill with legislators and groups involved with the construction and management of affordable public and private

housing and providing information to other interested state officials as appropriate.

(i) In the event the Home Rule Petition submitted by the City to the Massachusetts General Court in 1990 and currently pending before the General Court as H. 6239 of 1990, "An Act for a Petition for a Special Law to Empower the Boston Fair Housing Commission to Enforce By Judicial Power the Provisions of Title VIII and Impose Civil Penalties (Substantial Equivalency), is not promulgated and/or expires for any reason before the end of the current City Council session, the City shall submit forthwith the necessary legislation for a new petition to the City Council and upon passage to the General Court. This new petition shall seek enforcement powers for the Boston Fair Housing Commission no less effective or extensive than the powers sought by the City's pending Home Rule Petition. In the event that the City is precluded from submitting such new petition to the General Court on or before March 1, 1992, because of the City Council's failure to promulgate it, such event shall be deemed a violation of this condition. The City agrees to continue to seek such legislative passage through testimony before the City Council and the General Court, advocacy for the legislation with city councillors and state legislators and provision of information to interested persons and officials, as appropriate, until enactment of such legislation; and,

(ii) In the event that the City's pending or future Home Rule Petition, if and when promulgated, is interpreted by any binding decision of any court or other authority of competent jurisdiction to have restricted or abrogated to any extent any of the preexisting powers of the Boston Fair Housing Commission, as such powers were interpreted in the opinion of

the Corporation Counsel, entitled Re: Fair Housing Home Rule Petition, dated April 24, 1990 (a copy of which is attached hereto as Exhibit B), upon which opinion the parties to this action rely, the City shall submit the necessary legislation to the city council and upon passage submit to the General Court, legislation to restore the powers set forth in Exhibit B. In the event that the City is precluded from submitting such new petition to the General Court within two months of such judicial or other ruling because of the City Council's failure to promulgate it, such event shall be deemed a violation of this condition. The City agrees to continue to seek such legislative passage through testimony before the City Council and the General Court, advocacy for the legislation with city councillors and state legislators and provision of information to interested persons and officials, as appropriate, until enactment of such legislation.

d. An Affirmative Fair Housing Marketing Program, using as a model 24 C.F.R. 200.620, which Program requires the owners and operators of rental housing assisted by the Boston Redevelopment Authority ("BRA"), PFD or any other agency of the City of Boston with similar legal authority, as defined in Section II.B.2 of this Decree, to pursue affirmative fair housing marketing policies in soliciting buyers and tenants, in determining eligibility and in concluding sales and rental transactions.

(i) The Affirmative Fair Housing Marketing Program and the Affirmative Fair Housing Marketing Plans for each project covered by this provision shall be designed to enhance the availability of housing to Black persons in neighborhoods which are now predominantly white.

(ii) The goal of the Affirmative Fair Housing Marketing Program and its measure of success shall be to achieve a racial composition in assisted housing, as defined in Section II.B.1 of this Decree, in neighborhoods which are predominantly white, which reflects the racial composition of the City as a whole. Nothing herein shall constitute or be construed as requiring a quota.

e. A Fair Housing Public Education Program designed to make use of various public forums, such as broadcast media, bill boards, and community and social service organizations, to inform the public of rights and available remedies under applicable fair housing and anti-discrimination laws and regulations, including but not limited to, the existence and functions of the Commission, the Clearing Center, and of other components of the Fair Housing Program.

3. That, within sixty days of the effective date and every three months thereafter, the City prepare and submit to HUD such reports and statements regarding assisted housing as are required by HUD. Such submissions shall include, without limitation, a report regarding the progress of the implementation of the conditions imposed by HUD pursuant to this Decree, and a report on the racial and family composition and vacancy rate of assisted housing. The City shall also submit to HUD annually a plan for the projected use of funds for community development, as required by 42 U.S.C. § 5304.

C. Stock of Affordable Housing

1. HUD shall make best efforts through meetings, discussions, correspondence and technical assistance to encourage,

promote and assure that available resources allocated by HUD to the City of Boston, that may lawfully be used for housing assistance, are used to increase the supply of affordable integrated family housing in the City, whether public, public assisted, or private. Use of the phrase "to increase the supply of affordable integrated family housing" is not intended by the parties to prohibit HUD or the City from addressing demonstrated needs for other types of affordable housing as reflected in the City's approved Housing Assistance Plan.

2. HUD will provide subsidies for 500 units having, as an average 3 bedrooms, of Section 8 family housing for a maximum of 15 years subject to the following: HUD will make available in FY 1991 for use by a public housing agency with authority to operate in the City of Boston, funding sufficient to provide 5-year renewable project-based Section 8 subsidies for 300 units, to be located in the City of Boston and sited pursuant to 24 C.F.R. Part 882, Subpart G, and funding sufficient to provide Section 8 Existing Certificates for 200 units. This represents an amount which is in addition to what any public housing agency operating in Boston may receive under a fair share allocation. If the appropriations out of which HUD intends to fund the 5-year renewable project-based Section 8 subsidies for 300 units and the Section 8 Existing Certificates for 200 units were to become unavailable to provide assistance for two additional 5-year terms, then HUD agrees to make available funding to the recipient public housing agency(s) for a comparable substitute housing resource in order to provide assistance to the recipient public housing agency(s) for the remainder of the intended periods, if, and to the extent that, any appropriation is legally available for these purposes.

3. HUD shall not agree to any disposition of HUD-assisted multifamily housing which has the effect of reducing the supply of affordable HUD-assisted multifamily rental housing in the City available as of the effective date of this Decree. However, the requirements of this subsection shall not apply to public housing dwelling units whose disposition is subject to Section 18 of the United States Housing Act of 1937.

D. HUD Fair Housing Assistance

1. Beginning in FY 1991, HUD shall provide the following amounts for use in the City of Boston, $325,000 in FY 91 and, subject to available appropriations by Congress which may be used for this purpose, $125,000 in the subsequent three FY years (FY 92, FY 93, and FY 94), (i.e., a total of $700,000), to subsidize the unreimbursed legal assistance costs incurred by private attorneys pursuing judicial or administrative relief for fair housing violations. HUD and the plaintiff will agree to the general identity of the beneficiaries of these funds. This additional funding is subject to competitive bidding by eligible entities under applicable regulations or NOFAs and may be used independently or in connection with other grants. It is not intended that the recipient of this additional funding be precluded from competing for additional available HUD funds that may be used for the same or similar purpose.

2. Beginning in FY 1991, HUD shall grant to the City of Boston, $325,000 in FY 91 and, subject to available appropriations by Congress which may be used for this purpose, $125,000 in the subsequent three FY years (FY 92, FY 93, and FY 94) (i.e., a total of $700,000) over and above its an-

nual CDBG contributions to the City, to fund the BFHC's operation of the Boston Housing Opportunity Clearing Center established by Section II.B.3.a of this Decree. This funding is over and above HUD's annual CDBG contributions to the City and is intended to supplement and not supplant other comparable contracts and grants.

3. If, by July 1, 1991, the Commonwealth has not enacted into law H.6239 of 1990, "An Act for a Petition for a Special Law to Empower the Boston Fair Housing Commission to Enforce By Judicial Power the Provisions of Title VIII and Impose Civil Penalties (Substantial Equivalency)," HUD will seek the consent of the Massachusetts Commission Against Discrimination pursuant to Section 810(f)(2) of the Civil Rights Act of 1968, as amended, 42 U.S.C. § 3610(f), so that HUD may conduct Title VIII investigations and enforcement proceedings for alleged violations occurring in the City of Boston pending passage of H.6239, as presently pending, or as refiled. Investigation and enforcement activities undertaken by HUD with respect to any specific Title VIII complaint pursuant to this subsection shall not be subject to review by this court in this action. However, this shall not preclude review by this court of allegations by plaintiff that HUD has failed to comply with the commitments made by HUD in this subsection..

4. HUD agrees to provide testimony at the legislative hearings for the Home Rule Petition submitted by the City to the Massachusetts General Court in 1990 and pending before the General Court as H.6239 of 1990, "An Act for a Petition for a Special Law to Empower the Boston Fair Housing Commission to Enforce By Judicial Power the Provisions of Title VIII and Impose Civil Penalties (Substantial Equiva-

lency)," to advocate for the Home Rule Petition and to Provide information, as appropriate, and to engage in similar activities on behalf of comparable petitions that may be submitted pursuant to Section II.B.2.c.i of this Decree.

III. Monitoring and Reports

HUD shall submit, on the dates specified, to the court and serve upon the plaintiff until termination of this requirement by the court:

A. On February 1 and August 1 of each year, a report prepared by HUD or its grantees setting forth the current racial makeup, family composition and vacancy rate of HUD assisted multifamily rental housing projects or units, as defined in Section II.A of this decree, located in the City;

B. On September 23 and March 23 of each year, a report describing the activities carried out and the results achieved in implementing this Decree.

IV. Retention of Jurisdiction.

A. Jurisdiction is retained by the court for the purpose of enabling the plaintiff and HUD to apply to the court at any time for such further orders as may be necessary or appropriate for the construction, implementation, modification or enforcement of this Decree. However, no additional funding obligations not already explicitly contained in this Decree shall be imposed on HUD. In addition, prior to submission of any dispute under this Decree to the court, counsel for the parties shall consult in an effort to resolve the matter informally. Moreover, this Decree may only be modified (except

with respect to further conditions to be imposed on the City of Boston) with the prior written consent of counsel for all parties. The plaintiff agrees that it will not request the court to modify the conditions imposed on the City unless a) it has consulted with HUD in an effort to achieve the consent of HUD and the City to the proposed modifications and b) it appears as a result of information developed from the reporting requirements of this Decree or from other information, that the Fair Housing Program, as designed, cannot achieve the purposes and goals set forth in Section II.B.2.d within a reasonable time following the effective date of this Decree. The plaintiff agrees that it will not seek modification of the conditions imposed on the City before 14 months following the effective date of this Decree and no more frequently than one (1) year thereafter. In the event the plaintiff intends to seek a modification from the court based on information other than that developed from the reporting requirements of this Decree, then the plaintiff shall, not less than 30 days prior to seeking such modification, provide HUD with notice of its intention to seek such modification and the information upon which it will base its request so that HUD can advise the City of the plaintiff's intention and the information upon which the plaintiff will rely. HUD, however, reserves the right to object to any modifications to the conditions plaintiff propose to be imposed on the City of Boston.

B. At any time after the fifth anniversary of the effective date of this Decree, either HUD or the plaintiff may request the court to review the progress made by HUD in implementing this Decree, and, based upon such review, unless plaintiff demonstrates that HUD has not performed its mate-

rial obligations under this decree, the court will terminate this Decree.

C. If HUD is unable to comply with its obligations under this Decree, for lack of authorization or any other reason, either party may move for such comparable alternative relief as is appropriate. Such comparable alternative relief may not result in an increase in HUD's financial obligations as specified in this Decree. In addition, prior to submission of any dispute under this Decree to the court, counsel for the parties shall consult in an effort to resolve the matter informally.

V. Effective Date

This Consent Decree shall supersede and replace Sections II-IV of the Declaratory Judgment and Final Decree entered on June 23, 1989, and Clarification and Amendment of Judgment, dated September 14, 1989, when the First Circuit Court of Appeals dismisses Appeals Nos. 89-2100 and 90-1458. The date the last appeal is dismissed shall be the date on which this Consent Decree becomes effective ("the effective date").

FOR DEFENDANT JACK KEMP
Secretary of the United
States Department of
Housing and Urban
Development:

/s/
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United States Attorney

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WALTER J. SKINNER
United States District Judge

Date: March 8, 1991

APPENDIX B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

N.A.A.C.P., BOSTON CHAPTER,
Plaintiff,

v.

CIVIL ACTION
NO. 78-850-WJS

HENRY CISNEROS, Secretary of
Housing and Urban Development, et al.,
Defendants.

AMENDED MEMORANDUM AND ORDER ON
MOTION TO INTERVENE BY OLD WEST END
HOUSING CORP., ET AL.

June 21, 1996

SKINNER, S.D.J.

This action was originally brought by the N.A.A.C.P. to require the Department of Housing and Urban Development ("HUD") to enforce divers fair housing Statutes and regulations as a condition of providing federal subsidies for various housing programs in the City of Boston. After eleven years of hearings, attempts at mediation, and at least two trips to the Court of Appeals, this court entered a final decree on June 23, 1989. The case received considerable publicity in the local press. Yet another appeal was taken from the final decree, but the parties compromised by submitting a Consent

Decree to supersede the final decree. I adopted the proposed Consent Decree as the final decree of the court on March 8, 1991. Although the court reserved jurisdiction to enforce or modify the decree at the instigation *of the parties,* the case was for all practical purposes closed at that time.

The present controversy arises out of relatively ancient history. In 1959, the General Court of Massachusetts authorized the Boston Redevelopment Authority to initiate urban renewal programs within the City of Boston. The first major plan called for the renewal of the West End of Boston, which at the time contained much seriously deteriorating real estate, consisting of tenements and small commercial properties. It also contained a multi-ethnic but close-knit community mostly of immigrants and first generation Americans. The West End branch of the Boston Public Library was a major source of acculturation.

Unfortunately, the renewal was carried out in the tradition of General Sherman's urban renewal of Atlanta. Most of the buildings in the area were demolished, and the residents forced to relocate. The area was rebuilt with offices, high-rise apartments and condominium buildings far too expensive for the former residents.

Currently, however, the Boston Redevelopment Authority has authorized construction of a project by Lowell Square Associates which includes low- and middle-income housing. This project is to be constructed on the last available vacant land in the renewal area.

The proposed intervenors are the Old West End Housing Corp., a corporation organized for the purpose of assisting former West End residents to return to the West End (as well as to maintain communication with some 4000 former residents), and two former residents of the West End who are officers of the corporation (hereinafter collectively "Old

West") who claim to represent former West End residents asserting a preference in the assignment of low- and middle-income housing in the Lowell Square project. Their claim is based on a provision of M.G.L., c. 121B, §49, part of the statute authorizing urban renewal, which provides that the developer of an urban renewal project shall be required:

> . . . (c) to give preference in the selection of tenants for dwelling units in the project area to families displaced therefrom because of clearance and renewal activity who desire to live in such dwelling units and who will be able to pay rents or prices equal to rents or prices charged other families for similar or comparable dwelling units as part of the same redevelopment.

It would appear that the developer is willing to grant preferences to former West End residents, but that doing so would allegedly run afoul of a plethora of federal. state and local fair housing statutes and regulations, including the Consent Decree referred to above, which require that a substantial percentage of publicly supported housing be set aside for minority families. It is Old West's position that the Consent Decree should be modified or interpreted by this court to create an exception for former West End residents under the state statute quoted above.

The initial question is the suitability of intervention in this action as a vehicle for the accomplishment of Old West's goals. The trial judge's discretion to permit intervention is broad, but it is not untrammelled. In my opinion granting the pending motion would be an abuse of discretion under the controlling circuit precedent exemplified by *Caterino v.*

Barry, 922 F. 2d 37 (1st Cir. 1990), because it fails to meet at least two of the four criteria established by that case:

1. Timeliness. This case is for all practical purposes closed. The applicable rule, Fed.R.Civ.P. 24, contemplates that intervention will be allowed to permit the intervenor to be heard *before* the entry of a judgment or decree which may adversely affect the intervenor's interests. The case law is clear that intervention will be allowed only in an ongoing case and will not be permitted to revive one that has been effectively closed, except in unusual circumstances. The circumstances that I have described above clearly do not meet the requirements of timeliness set out in *Devereau v. Geary*, 765 F. 2d 268 (1st Cir. 1985). *Garrity v. Gallen*, 697 F. 2d 452, 458 (1st Cir. 1983).

2. Substantial and direct right in the litigation. This case has been concerned with HUD's failure to impose and enforce proper conditions on HUD financial support for the City of Boston. The disposition of particular parcels of real estate was never considered. For the intervenors to achieve the result they seek would require the joining of several government entities as parties. A number of new legal theories would have to be considered, including whether the Massachusetts statute creates a private right of action, and the possible operation of a statute of limitations. These issues bear no relationship to this case.

Accordingly, the motion to intervene is **denied.**

/s/
United States District Judge

APPENDIX C.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALFRED J. RASO, et al., Plaintiffs,	)	
v.	)	C.A. No. 96-11945
MARISA LAGO, et al., Defendants.	)	

MEMORANDUM AND ORDER

WOLF, D.J. January 6, 1997

I. INTRODUCTION

Plaintiffs, a putative class headed by several former residents of Boston's Old West End neighborhood and the Old West End Housing Corporation ("OWEHC"), an organization devoted to the resettlement of former West End residents, seek among other things a declaration that they are entitled to preference for all of the new dwelling units soon to become available in the buildings now being constructed at West End Place. Plaintiffs have named as defendants numerous parties who, for purposes of identification and representation, can be categorized into four groups: (1) the Boston Redevelopment Authority and its Director, Marisa Lago, (collectively the "BRA") (2) the United States Department of Housing and Urban Development ("HUD") and its Secretary, Henry Cisneros, (collectively the "Federal Defendants"); (3)

the City of Boston and its Mayor, Thomas Menino, the Boston Fair Housing Commission and its Director, Victoria Williams, and the Boston Housing Authority, and its Director, Sandra Henriquez,[1] (collectively the "City Defendants"); and (4) Keen Development Corporation and its President, Robert Keuhn, Jr., who is also a Trustee of the Lowell Square Nominee Trust, the Planning Office of Urban Affairs, Inc. and its Director, Reverend Michael Groden, also a Trustee of the Lowell Square Nominee Trust, Lowell Square Associates, Joint Venture, Lowell Square Cooperative L.P., and Maloney Properties, Inc., and its President Mark Maloney (collectively the "Developer Defendants").

The court first encountered this case on October 21, 1996 in the form of an emergency motion for a preliminary injunction, which plaintiffs filed in an effort to halt the preliminary housing lottery for units at West End Place scheduled for October 29, 1996. In a hearing held on October 28, 1996, plaintiffs withdrew their effort to enjoin the lottery because the Developer Defendants were willing to permit members of their putative class to be present and monitor the lottery process. See October 28, 1996 Transcript at 3.

The Developer Defendants, however, informed the court that the mere pendency of this case constitutes an event of default under the terms of their loan agreements and its perpetuation could imperil the projects financing. Therefore, the court established a schedule for the expeditious resolution of defendants' then planned motion to dismiss. After an opportunity for discovery related to issues the defendants informed the plaintiffs they would raise in their motion to dismiss, on November 20, 1996 the court heard argument on that motion

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[1] Plaintiffs have voluntarily dismissed the Boston Housing Authority. See November 20, 1996 Transcript, at 4.

which, to the limited extent it relies on information outside the Complaint (which incorporates a number of exhibits), is being treated as a motion for summary judgment. See Fed. R. Civ. P. 12(b)(6).

As explained below, the court finds that plaintiffs may lack standing to litigate whether the BRA's actions required the approval of the Boston City Council and, in any event, this claim is time-barred. The court has considered the merits of every other claim in the complaint and finds that plaintiffs have no statutory or contractual property right to an absolute preference to the units at West End Place. The absence of a state-created property interest eliminates plaintiffs' claim, under 42 U.S.C. § 1983, that they had a right to due process that has been violated.

Plaintiffs also appear to allege in Count III that the defendants' plan to affirmatively solicit minority applicants for West End Place discriminates against them because they are predominantly white, in violation of their Fourteenth Amendment right to equal protection under the law. To the extent that plaintiffs attack defendants' affirmative marketing plan facially, their claim is deficient because it fails to allege that the defendants acted with discriminatory intent, and because the affirmative recruitment of minority applicants is not itself a "benefit" subject to equal protection analysis; the plan for actual tenant selection does not provide for consideration of race or give minorities any preference. Plaintiffs' claim under Title VI of the Civil Rights Act of 1964 is similarly deficient. Finally, plaintiffs' allegation that the plan violates Title VIII of the Civil Rights Act of 1968 is being dismissed for failing to allege specific facts that would permit a finding that some practice disproportionately burdens a protected class.

To the extent, however, that the equal protection, Title VI, and Title VIII claims are meant to challenge an illegal divergence from the terms of the affirmative marketing plan during its operation, they appear to be premature. However, the court will provide the parties an opportunity to address whether plaintiffs should be afforded an opportunity to move to amend their Complaint, or whether these claims should now be dismissed without prejudice.

II. FACTS

Except as otherwise noted, the facts of this case are taken from the Complaint and the exhibits it incorporates. In approximately 1959, as part of an urban renewal project, the City of Boston took title by eminent domain to a large swath of land in Boston known as the West End. Approximately three thousand households were displaced by this government action. Compl., ¶ 35. These residents were a largely immigrant community composed of a mix of different ethnic groups, including Irish, Italians, Jews, Greeks, Poles, Albanians, Ukrainians, Russians, Native Americans and African-Americans. Id. at ¶ 32. Defendants estimate that the displaced residents were approximately 98% white. Declaration of Merryl Gibbs ("Gibbs Decl."), Federal Def.'s Opposition to Pl.'s Motion for Preliminary Injunctions and Orders ("Fed. Def.'s Opp. to P/I"), Exhibit 2, at ¶ 15. The plaintiffs evidently do not dispute the fact that the overwhelming majority of the displaced residents were white.[2] In any event, although

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[2] Indeed, plaintiffs attached to their Complaint a preliminary marketing analysis conducted by the Developers in April 1996 which showed that of the former West End residents who were "definitely interested" in living at West End Place, 433 were white, 19 were Black, 4 were Latino,

numerous redevelopment projects over the years erected new residential structures in the West End, many of the displaced residents of the Old West End were unable to afford the new housing and, therefore, were unable to return to their old neighborhood. Id. at ¶ 33.

Under the original West End Plan of 1959, Charles River Park, Inc. ("CRP") was designated the private redeveloper of the Plan Area. In 1990, a state court determined that CRP had defaulted under the Master Lease Agreement. Id. at ¶ 36. Within the next year, the BRA designated Lowell Square Associates ("LSA") as the redeveloper of the last remaining undeveloped parcel of the old West End -- the land at the intersection of Causeway Street and Lomasney Way, known as "Lowell Square" or "Area E." Id. at ¶ 44. In a grant proposal, LSA stated that "Lowell Square is the last opportunity for the City and State to assist former West Enders and other low and moderate income households to reclaim a corner of this community." Id. at ¶ 50.

At about the same time that LSA was designated the redeveloper of Area E, United States District Judge Walter J. Skinner presided over the conclusion of a decade-long legal battle between the Boston Chapter of the National Association for the Advancement of Colored People ("NAACP") and HUD concerning the availability of public housing to minorities in Boston. In that litigation, Judge Skinner found that:

> HUD had failed to satisfy the minimum levels of compliance required by [42 U.S.C.] § 3608(e)(5) in two respects. First, the agency

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and 12 checked "Other." Preliminary Marketing Analysis, April 10, 1996, Compl., Exhibit H.

> did not require the City to establish an effective fair housing enforcement program in the face of its knowledge of pervasive racial discrimination in the City. Second, despite its knowledge that a housing emergency existed which had a disproportionate impact on low income black families, HUD did not condition its provision of federal funds . . . on construction of affordable integrated public housing.

NAACP, Boston Chapter v. Kemp, 721 F.Supp. 361, 365 (D.Mass. 1989);[3] see also NAACP, Boston Chapter v. Pierce, 624 F.Supp. 1083, 1085 (D.Mass. 1985), vacated on other grounds, 817 F.2d 149 (1st Cir. 1987). In light of those findings, on March 8, 1991 Judge Skinner entered a Consent Decree obligating HUD, among other things, to require any recipient of federal housing funds to implement an affirmative fair housing marketing plan in order to enhance low-income African-American households' access to affordable housing in the Boston area. NAACP, Boston Chapter v. Kemp, No. 78-850-S, slip op. (D.Mass. March 8, 1991), attached at Compl., Exhibit C ("Consent Decree"), at 2. The Consent Decree established as a goal that affirmative marketing programs achieve a racial composition in federally assisted housing which "reflects the racial composition of the City [of Boston] as a whole." Id. it also expressly stated,

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[3] 42 U.S.C. § 3608(e)(5) requires HUD and its grantees to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter [entitled "Fair Housing"]."

however, that: "Nothing herein shall constitute or be construed as requiring a quota." Id.

The Lowell Square project is, in part, federally funded through several programs administered by HUD.[4] Among the criteria established by HUD to select recipients for such funding is whether the project will increase housing choices and foster neighborhood diversity. 60 Fed. Reg. 5806, 5808 (January 30, 1995); see also Gibbs Decl., ¶ 8. In addition, as discussed infra, even without regard to the Consent Decree, federal law requires affirmative fair housing marketing to minorities in federally funded projects. See, e.g., 24 C.F.R. § 200.610 (1996). Thus, addressing this issue was essential to securing federal funding for West End Place. After much discussion, and a mediation, among those involved in the Lowell Square project about how to accommodate the requirements of federal law and the interests of former West Enders, on May 14, 1994, LSA entered into a Participation Agreement with OWEHC which states in part that "purchase (and/or rental) preference shall be afforded to former West Enders (subject only to applicable local, state, and federal laws . . .), both at initial occupancy and through turnover throughout the life of the development." Participation Agreement, Pl.'s Mem. in Support of Their Motion for Preliminary Injunctions ("Pl.'s P/I Mem."), Exhibit K, at 7 (emphasis added).

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[4] Federal funding derives from several sources including the Section 8 Community Investment Demonstration Program, enacted by the HUD Demonstration Act of 1993, P.L. 103-20, § 6, 107 Stat. 1148, reprinted in 42 U.S.C.S. § 1437f, at 50 (Supp. May, 1996), and the HOME Investment Partnership Act of 1990, 42 U.S.C. §§ 12741 et seq. See Federal Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss, at 2.

On December 21, 1994, the BRA exercised its power of eminent domain to take title to the land in Area E. Compl., at ¶ 61. One week later, the BRA entered into a Land Disposition Agreement ("LDA") with the developers and deeded the property to them. Id. at ¶ 63. These documents set the terms and conditions for the Lowell Square project. The LDA contains a provision which states: "Subject to the Affirmative Fair Housing and Marketing Plan attached hereto . . . the Redeveloper agrees to give preference in the selection of Unit Lessees for dwelling units built on the Property to displaced families . . ." LDA, Compl., Exhibit D, at 29 (emphasis added). The adoption of this Affirmative Fair Housing and Marketing Plan ("AFHMP" or the "Plan") was a requirement of federal law. Federal regulations require recipients of HUD assistance to "[c]arry out an affirmative program to attract buyers or tenants . . . of all minority and majority groups to the housing for initial sale or rental." 24 C.F.R. § 200.620 (1996); see also Fed. Def.'s Opp. to P/I, at 4 & n. 3. The AFHMP was also required by the Kemp Consent Decree. Consent Decree, at 6 (citing 24 C.F.R. § 200.620).

The AFHMP designed for West End Place states that its goals are:

> to provide a community at West End Place that will reflect the racial and economic diversity of the City at large while housing as many West Enders displaced by Urban Renewal as possible. The minority participation goal set forth in this plan is 41% which is also representative of the City's overall minority population.

Affirmative Fair Housing and Marketing Plan, West End Place, Boston, Massachusetts, July 19, 1996, Exhibit A to Affidavit of Mark Maloney ("Maloney Aff."), (Developer Defendants') Opposition to Motion for Preliminary Injunction ("Developers,' Opp. to P/I"), Exhibit C, at 11. Under the AFHMP, this "goal" is to be pursued primarily through an advertising strategy which targets minorities. Id. at 13-14.

At the same time, however, the Plan also provides "special outreach" efforts to former West Enders, including notification "by a letter which requested that they indicate their interest in West End Place by contacting the Old West End Housing Corporation." Maloney Aff., at ¶ 9.[5] The Developer Defendants also conducted additional marketing beyond that specified in the Plan. They sent information to more than 1500 people who had expressed an interest in West End Place, and they advertised to former West Enders through their newspaper, The West Ender. Id. at ¶¶ 6-7.

In an attempt to accommodate the interests of former West Enders and to leave ample units available to minorities and other applicants, in the AFHMP the Developers set aside 55% of the residential units for former West Enders. Maloney Aff., at ¶ 4; see AFHMP, at 21-22 (draw ratios reflecting set-aside). The residential component of West End Place consists of 183 cooperative apartments. AFHMP, at 1; Affidavit of Robert Keuhn, Jr. ("Keuhn Aff."), Developers' Opp. to P/I, Exhibit A, at ¶ 54. 58 of these are classified as low-income (Section 8-financed) units, 48 are moderate-income units, and 77 will be rented at market rates. AFHMP, at 8; Keuhn Aff., at ¶ 54. Of these the following are

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[5] The AFHMP also provides for additional marketing and outreach efforts to two other groups not defined by race: "people living with AIDS," and "physically challenged" people. AFHMP, at 11.

reserved for former West Enders: 33% (or 19) of the low-income units; 50% (or 24) of the moderate-income units; and 75% (or 58) of the market-rate units. Maloney Aff., at ¶ 4. In order to reserve a portion of the Section 8-financed units for former West Enders, the Developers sought and obtained special waivers from HUD's Assistant Secretary of Housing. Gibbs Decl., ¶ 16.

According to the AFHMP as written, the actual tenant selection process consists of a series of steps. Throughout the affirmative marketing and outreach efforts, the Developers will accept written applications from prospective tenants. AFHMP, at 18-19.[6] In addition to requesting income information, the application forms provide boxes in which applicants can identify themselves as former West Enders and indicate their race. See Pl.'s Mem. in opposition to Def.'s Motions to Dismiss ("Pl.'s Opposition"), Exhibit A.[7] After the deadline for accepting applications passes, an initial lot-

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[6] Advertisements for West End Place direct interested people to call Maloney Properties, which then sends out application forms. AFHMP, at 19.

[7] The West Ender preference box is titled "ELIGIBILITY FOR PREFERENCE STATUS" and prompts the applicant to answer yes or no to the following statement: "You were living in the West End of Boston and displaced by urban renewal after March 1, 1953. Displacees are defined as heads of household, their spouses, children and/or other person for whom any member of the household had a legal obligation to provide care." If an applicant checks "Yes," he or she must write in the year of the displacement. Id.

The race/national origin box, which provides various options for the applicant to check, states: "Race/National Origin information will be used for statistical purposes only, and will not affect the status or selection of applicants. Answering this question is completely optional." Id.

tery is held which randomly assigns each applicant an overall rank for selection purposes. Id. at 21.

These preliminary stages of the tenant selection process have been completed. The developers sent out 3172 preliminary applications and received 1858 back, 308 from former residents of the West End. Supplemental Affidavit of Mark Maloney ("Suppl. Maloney Aff."), at ¶ 11. Of these 308, 152 former West End residents have represented that they qualify for the 58 low-income units, 100 that they qualify for the 48 moderate-income units, and 56 that they can afford the 77 market-rate units. Id. The number of applicants displaced from the West End, therefore, exceeds the number of spaces set aside for them within the development and, indeed, for two of the categories exceeds the total number of units. Id. at ¶¶ 5-6.

The applications also reveal the racial composition of the putative plaintiff class. Of the 308 applications received from former West Enders, all but 19 applicants identified their race. Maloney Aff., at ¶ 12; Suppl. Maloney Aff., at ¶ 11. 276 applicants were white, 12 were African-American, and one was Latino. Maloney Aff., at ¶ 12. Thus, excluding the 19 who did not identify their race, it appears that the former West Enders interested in renting at West End Place are 95.5% white and 4.17% African-American.

The lottery for numerically ranking the applicants was conducted on October 29, 1996. Second Affidavit of Mark Maloney, Mem. in Support of Developer Def.'s Motion to Dismiss ("Developer's Mem."), Exhibit A, ¶ 2. Plaintiffs Alfred J. Raso and Frank Lavine were among those applicants, and they received lottery numbers 1686 and 1053 respectively. Pl.'s Opposition, Exhibit A.

The next step in the tenant selection process, according to the AFHMP, will be to separate the applicants into two

pools: one for former West Enders and one for all other applicants. AFHMP, at 21; see also Maloney Aff., at ¶ 13. After they are so divided, the following step will be "to verify the income and other eligibility criteria for the highest ranked applications in the two pools." AFHMP, at 21.[8] Finally, the highest-ranked applicants will be matched to apartments with the appropriate number of bedrooms in their income bracket according to a prescribed drawing ratio reflecting the set asides for West Enders in each income bracket. Id. Thus, for low-income units, the draw ratio is one West Ender to every two non-West Enders; for moderate-income apartments the ratio is 1:1; and for market-rate apartments the ratio is 3:1. Id.[9] The matching of applicants to apartments continues until all of the apartments in a category are assigned. Id. at 22. The AFHMP also provides for the

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[8] The other "eligibility criteria" are defined earlier in the Plan to include household size and various risk factors, based on indicia such as past behavior, landlord recommendations, and criminal record, that would suggest, among other things, that the applicant would not pay rent or would endanger other residents. See AFHMP, at 16-18.

[9] The AFHMP describes the mechanics of this process. For example, in the low-income category the selection would proceed as follows:

> The first eligible applicant based on the lottery ranking in Pool A [former West Enders] will be selected followed by the first two applicants in Pool B [non-West Enders]. This process is repeated, one draw versus two draws, until all one bedrooms reserved in [the] low-income category are assigned, and the same procedures will be followed to assign the two and three bedroom apartments in this income category. If at any time Pool A or Pool B is exhausted of eligible applicants, selection will then be made solely from the remaining pool.

Id. at 22.

creation of a waiting list for future vacancies, Id. at 20, procedures for accepting applicants from that list, id. at 23, as well as "continuing affirmative marketing objectives," Id. at 15. The Developer Defendants have pledged that in "processing applications, selecting residents from among eligible applicants of [sic] the waiting list and assigning units," they will not discriminate based on, among other things, race or color. Id. at 12.

As the foregoing indicates, the AFHMP does not provide for the consideration of race in establishing priorities or assigning units. Qualified African-Americans and other minorities may be included in the pool of applicants eligible for the 55% of the units reserved for displaced West Enders. Whites are eligible for the remaining units that are to be made available to applicants without roots in the West End. Within each pool of applicants, priority for the assignment of units is, under the AFHMP, established by a lottery which does not take race into account. Rather, the Developer Defendants are depending solely on the efficacy of their affirmative recruitment of qualified minority applicants in seeking to achieve their goal of a tenant population that is as diverse as the City of Boston. If this effort fails, however, no one will be assigned a unit in whole or in part because of his or her minority status.

As Plaintiffs have recognized, at this time it is too early to determine whether the Developer Defendants have deviated from the AFHMP in any way which may be material to the legality of their conduct. See November 20, 1996 Transcript ("Tr.") at 66-67. Accordingly, the court is addressing the legality of the AFHMP as written. The legality of the Developer Defendants' actual conduct must be reserved for future consideration, if it is to be decided at all.

III. SUMMARY OF COMPLAINT

The rather rambling complaint consists of six counts, several of which allege multiple causes of action. Count I seeks a declaratory judgment that a property right in the form of an equitable easement and servitude vested in the plaintiffs the moment the BRA took title to Area E and that members of the putative plaintiff class are entitled to exercise their statutorily conferred preference as a right of first refusal in West End Place. Compl., at 22. Count II seeks a declaratory judgment that the legislature created a trust for the plaintiffs in M.G.L. c. 121B, § 49, thus making the BRA and all of its successors in interest trustees who owe a fiduciary duty to members of the putative plaintiff class who are alleged to be the beneficiaries of the trust. Id. at 22-23. It also requests various forms of injunctive relief for alleged breaches of fiduciary duty, including the requirement that the BRA obtain approval for the project from the Boston City Council and the Massachusetts Department of Community Affairs ("DCA") pursuant to M.G.L. c. 121B, § 48. Id. at 23-24. Neither the Boston City Council nor the DCA are parties to this case, but the Council filed an amicus brief contending its approval was required. See generally Memorandum in the Nature of an Amicus ("Amicus").

Counts III and IV are claims brought under 42 U.S.C. § 1983 for the following acts: (1) failing to enforce plaintiffs' claimed statutory preference according to M.G.L. c. 121B, § 49; (2) unlawfully modifying the content and subject matter of the original West End Plan; (3) permitting the original developer, CRP, to convert all rental units in the Plan Area to condominiums; (4) failing to obtain City Council and DCA approval of the changes to the Plan; and (5) applying the Consent Decree to the tenant selection process and "thereby

depriving the Plaintiffs of a benefit on the basis of racial classifications." Compl., at 25-26.

Count V alleges that the application of the terms of the Consent Decree and the AFHMP to the tenant selection process discriminates against plaintiffs on the basis of their race in violation of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968. Id. at 26. Finally, Count VI makes a similar allegation arising under Title VI of the Civil Rights Act of 1964. Id. at 27.

IV. DISCUSSION

A. Standard for Deciding Motion to Dismiss

"In considering a motion to dismiss, a court must take the allegations in the complaint as true and must make all reasonable inferences in favor of the plaintiffs." Watterson v. Page, 987 F. 2d 1, 3 (1st Cir. 1993). A court may also "properly consider the relevant entirety of a document integral to or explicitly relied upon in the complaint, even though not attached to the complaint, without converting the motion into one for summary judgment." Shaw v. Digital Equipment Corp., 82 F.3d 1194, 1220 (1st Cir. 1996) (citing Watterson, 987 F. 2d at 3-4).[10] "A complaint should not be dismissed for failure to state a claim unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

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[10] The Complaint refers to the AFHMP either directly or by inference in paragraphs 68 (b), 101, 105, 107, and 109, but does not include a copy. Defendants placed a copy of the Plan into the record. See Fed. Def.'s Opp. to P/ I, Exhibit 3; Developer's Opp. to P/I, Exhibit C.

Miranda v. Ponce Federal Bank, 948 F.2d 41, 44 (1st Cir. 1991) (quoting Conley v. Gibson, 355 U.S. 41, 45 (1957)).

The standard for stating a claim upon which relief can be granted is not, however, "toothless." The Dartmouth Review v. Dartmouth College, 889 F.2d 13, 16 (1st Cir. 1989). Plaintiffs must "set forth in their complaint 'factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery under some actionable legal theory.'" Id. (quoting Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir. 1988)). As described further, infra, in a civil rights case, meeting this obligation is particularly important. Id. In order to "avoid tarring defendants' reputations unfairly and to prevent potential abuses, . . . plaintiffs [must] outline facts sufficient to convey specific instances of unlawful discrimination." Id.

If, as in some respects here, on a motion to dismiss for failure to state a claim upon which relief can be granted matters outside the pleadings are considered, the motion is treated as one for summary judgment. Fed. R. Civ. P. 12(b)(6). Summary judgment is appropriate only if the record, viewed in the light most favorable to the non-moving party, "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995). Among other things, on a motion for summary judgment an opposing party is entitled to relevant discovery and an opportunity to present all pertinent material. Fed. R. Civ. P. 56(f) and 12(b)(6). As explained below, to the limited extent matters outside the Complaint have been relied upon, the court is satisfied that plaintiffs have had all the discovery necessary to address the issues that are now ripe for decision.

B. Plaintiffs' Claims Are Time-Barred Under M.G.L. 121B. § 48

The defendants initially challenged plaintiffs' standing to raise their § 1983, Title VI, and Title VIII claims. However, subsequent to named plaintiffs Raso and Lavine's filing of residence applications for West End Place, they retracted that contention. See Tr. at 30.[11] Nevertheless, defendants continue to maintain their opposition to plaintiffs, standing to bring a claim based upon M.G.L. c. 121B, § 48.[12]

Plaintiffs assert that a series of BRA decisions related to the Lowell Square project were "ultra vires" because they were made without DCA and City Council approval under § 48 or its predecessor, M.G.L. c. 121, § 26KK. See, e.g., Pl.'s Mem. in Support of Their Motion for Preliminary In-

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[11] Because Raso and Lavine's standing is uncontested on these issues, the court will not address the distinct and more difficult issue of organizational standing presented by OWEHC's status as a plaintiff. See, e.g., United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., ___ U.S. ___, 116 S.Ct. 1529 (1996) ; Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium, 836 F.Supp. 45 (D.Mass. 1993).

[12] Section 48 states in pertinent part: "No urban renewal project shall be undertaken until (1) a public hearing relating to the urban renewal plan for such project has been held after due notice before the city council . . . and (2) the urban renewal plan therefor has been approved by the municipal officers and the department as provided in this section." M.G.L. c. 121B, § 48. The definitions section of the statute makes clear that "municipal officers" refers to "the city council with the approval of the mayor" and that "department" means the relevant "department of community affairs." Id. at § 1.

junctions ("Pl.'s P/I Mem."), at 13-15.[13] Defendant BRA responds that § 48 does not require City Council approval of its action in this case, that there is no private right of action under § 48, and in any event plaintiffs' effort to secure judicial review is time-barred. See BRA Mem. in Support of Motion to Dismiss ("BRA Mem."), at 3-8. The court agrees that it is questionable whether § 48 provides a right of action for private parties, like plaintiffs, to challenge BRA decisions. In any case, the court finds that plaintiffs' action under § 48 is time-barred.

Section 48 details the approval process a proposed urban renewal plan must go through, but it does not mention judicial review of BRA actions alleged not to conform to its requirements. Indeed, M.G.L. c. 121B as a whole contains no judicial review provision. Typically, where an administrative agency's enabling statute contains no judicial review provision, the Massachusetts Administrative Procedure Act ("MAPA") supplies a default method of review. See M.G.L. c. 30A, § 14. However, MAPA review is unavailable for the decisions of a redevelopment authority because an authority is not an "agency" for the purposes of the MAPA, Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Bd. of Lawrence ("Elks Lodge"), 403 Mass. 531, 538 (1988), and the hearings conducted for the approval of an urban renewal plan are not "adjudicatory proceedings" within the meaning of the statute, Reid v. Acting Commissioner of the

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[13] Plaintiffs, and amicus Boston City Council, also assert that the BRA acted without proper formal votes as it is required to do. Compl., at ¶ 70; Amicus, at 5. This contention does not require separate treatment because, as discussed infra, plaintiffs' challenge to the BRA's actions is time-barred.

Department of Community Affairs, 362 Mass. 136, 142-144 (1972).

This does not mean, however, that all BRA actions are unreviewable. Under Massachusetts law, a plaintiff has standing to sue if, among other things, he or she "can allege any injury within the area of concern of the statute or regulatory scheme under which the injurious action has occurred." Elks Lodge, 403 Mass. at 545 (internal quotation marks omitted). Both the Boston City Council and the DCA arguably fall within the "area of concern" of § 48, for the statute requires the BRA to obtain their permission for the initiation of an urban renewal plan. However, the court need not decide whether these entities have standing to sue the BRA under 48 because neither is a party to this litigation.

The question presented in this case is whether private citizens may sue under M.G.L. c. 121B, § 48. In Elks Lodge, the Supreme Judicial Court permitted a private plaintiff to sue the Lawrence Redevelopment Authority to challenge the Authority's decision to take the plaintiff's land for a M.G.L. c. 121B urban renewal project. 403 Mass. 531 (1988). Noting the absence of an express review provision, the Supreme Judicial Court reasoned that:

> the legislative nature of the [Authority's] findings . . . and the absence of a statutory requirement that the [DCA] explain its findings, see G.L. c. 121B, § 48, do not indicate a legislative intent to preclude review. These factors indicate a legislative scheme which provides for less rigorous judicial scrutiny, rather than no judicial scrutiny.

Id. at 537 (some citations omitted). The Supreme Judicial Court pointed out that it has "consistently stated that courts may review the purpose for which land is taken," Id. at 536, and, therefore, allowed the plaintiff's lawsuit.

The case at bar differs from Elks Lodge in that the challenge, properly construed, is not to the initial taking of Area E, but to BRA decisions which plaintiffs allege result in improper modifications to the West End Plan approved in the 1950s.[14] The BRA contends that this difference is critical. See Tr. at 12. Arguably, because the legislature vested in the BRA "primary responsibility for . . . supervising the execution of the plan," Commissioner of the Dept. of Community Affairs v. Boston Redevelopment Authority, 362 Mass. 602, 613 (1972) ("DCA") (emphasis added), the BRA has more discretion concerning modifications to an urban renewal plan than to an initial taking.

However, it is not necessary to decide whether this distinction is material for standing purposes because even if plaintiffs had a private right of action, their complaint would be time-barred. When the Supreme Judicial Court has found an implied right of action in M.G.L. c. 121B, it has borrowed the relevant provision from M.G.L. c. 121A, which governs privately conducted "Urban Redevelopment Corporations". See Boston Edison Co. v. Boston Redevelopment Authority, 374 Mass. 37, 52-53 (1977); Cumberland Farms, Inc. v. Montague Economic Development and Industrial Corp., 38

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[14] Even if the complaint could be viewed as challenging the taking of the land, plaintiffs would not satisfy the traditional injury-in-fact requirement of standing because Area E is not their land. See Lujan v. Defenders of Wildlife, 504 U.S. 5550, 560 (1992) (stating injury-in-fact requirement).

Mass. App. Ct. 615, 622 (1995).[15] The exclusive remedy for c. 121A plans is an action in the nature of certiorari which must be filed within thirty days of the decision causing the alleged injury. St. 1960, c. 652, § 13. This provision shortens the standard sixty-day period in which actions in the nature of certiorari must normally be filed. Compare M.G.L. c. 249, § 4. Because the period for seeking review of the last challenged BRA decision (the approval of the CRP condo-conversion in June 1995) expired more than a year before this action was filed in September 1996, plaintiffs' claims alleging a violation of § 48 are timebarred.[16]

The BRA correctly contends that the absence of judicial review at this time is not merely a "technical" point. BRA Mem., at 7. The limited window for judicial review of decisions concerning urban renewal projects "reflects a legislative determination that challenges to governmental proceedings [must] be sufficiently prompt so that neither the

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[15] The primary difference between c. 121A plans and c. 121B plans is that c. 121A plans are privately run. Boston Edison, 374 Mass. at 52-53. The Supreme Judicial Court in Boston Edison reasoned that the lack of "participation by public bodies" like the BRA in c. 121A plans militates in favor of greater judicial scrutiny of BRA action in c. 121A plans than in c. 121B plans. Id. (c. 121B plans governed by the arbitrary and capricious standard while c. 121A plans governed by substantial evidence test).

[16] Plaintiffs contend that judicial review should be available under a "fundamental fairness" theory which they erroneously derive from Palmer v. Rent Control Bd. of Brookline, 7 Mass. App. Ct. 110, 115 (1979). This contention is without merit. Not only was Palmer's discussion of fairness made in the context of the amount of process due in an administrative hearing, and not in the context of the availability of judicial review, but judicial review there was available pursuant to explicit statutory mandate. See Id. at 114 n.5.

public body nor private parties working with it are in significantly changed positions when the attack on the underlying proceedings is made." Cumberland Farms, 38 Mass. App. Ct. at 623. In this case, the limited opportunity for review assures the "private redevelopers, and their lenders, contractors, [and] investors . . . that once the thirty-day period to challenge actions has passed, they can commit their time and resources to completing the redevelopment process." BRA Mem., at 8. Accordingly, the court finds that the plaintiffs' claims under § 48 are time-barred.

In the interest of completeness, however, the court notes that even had plaintiffs brought suit in a timely fashion, it is unlikely they would have prevailed on the merits of their § 48 claim. The Supreme Judicial Court has held that Boston City Council approval is not necessary for modifications to the West End Plan. DCA, 362 Mass. at 613. Moreover, approval by the DCA is required only when changes to the plan are "fundamental." Id. at 618. With regard to determining whether a change is "fundamental," the Supreme Judicial Court has instructed that:

> Any assessment of the magnitude of the . . . revisions must be made with reference to the affected parcel. The plan has been developed as a comprehensive scheme for a large, integrated area; even a change which totally altered one small parcel might have only a negligible effect on the overall nature of the development.

Id. at 619.

Plaintiffs' strongest argument on the issue of whether a fundamental change has occurred concerns the effect of the use of cooperatively owned, as opposed to rented, residential units at West End Place. Compl., ¶ 69; see Developer's Mem., at 17 (describing ownership structure). However, assuming without deciding that the West End Plan did not originally envision cooperative ownership, the court would still be likely to find that these changes were not "fundamental." The changes to Area E appear less drastic than those deemed not fundamental in DCA itself. See 362 Mass. at 619 (combining two parcels designated "public" and intended for a school with two parcels designated "residential" into a single parcel for residential and commercial use not a "fundamental" change). In addition, the case upon which plaintiffs rely, Bronstein v. Prudential Ins. Co., 390 Mass. 701 (1984), which held that a change to cooperatives and condominiums was a fundamental change in a c. 121A plan, is distinguishable because the motivating rationale in that case -- the effect of the change in ownership status of the units on existing tenants, id. at 711 -- is not present with regard to the units now being built at West End Place.

Furthermore, the court would be unlikely to accept plaintiffs' contention that an agreement between the BRA and CRP, which permitted the conversion of many existing CRP-owned apartments into condominiums in exchange for an easement from CRP for parking and delivery access next to West End Place, greatly broadens the extent of the condominium or cooperative-conversion. Pl.'s Opposition, at 7. The impact of this agreement on the "affected parcel," DCA, 362 Mass. at 619, appears to be minor, merely designating a strip of land for parking space and delivery access. Consequently, if the issue were properly before it, the court would

likely find that the modifications to the original West End Plan occasioned by the Lowell Square project were not "fundamental" changes necessitating DCA approval.

C. M.G.L. c. 121B, § 49 Does Not Provide Former West Enders With a Right to All New Units

Plaintiffs also claim that displaced West End residents have a statutory right to preference in the assignment of all units at West End Place and, indeed, that this constitutes a property interest created by state law. While these claims are rooted in certain statutory language, when viewed in the context of the complete relevant statute and the applicable federal law, it is evident that these contentions are incorrect.

As plaintiffs understandably observe, M.G.L. c. 121B, § 49 does state in part that:

> If an urban renewal agency shall sell or lease any property acquired by it for an urban renewal project, the terms of such sales or leases shall obligate the purchasers or lessees . . . (c) to give preference in the selection of tenants for dwelling units built in the project area to families displaced therefrom because of clearance and urban renewal activity who desire to live in such dwelling units and who will be able to pay [the required] rents.

This provision, however, is immediately followed by subsection (d), which states that purchasers or lessees of property acquired for an urban renewal project shall also be obligated:

> (d) to comply with such other conditions are deemed necessary to carry out this chapter, or requirements of federal legislation or regulations under which loans, grants or contributions have been made or agreed to be made to meet a part of the cost of the project.[17]

Therefore, an ambiguity is created by the interaction of subsections (c) and (d) of M.G.L. c. 121B § 49. Subsection (c), if looked at in isolation, would in this case seem to grant an absolute preference to displaced West End residents, but subsection (d) requires conformity with federal law, which in this case does not permit such an unqualified preference.

The BRA interprets subsection (d) as qualifying and limiting the preference granted by subsection (c). See, e.g., Tr. at 28; Developer's Mem., at 3. As the agency charged with administering the statute, its reasonable interpretation of legislative intent deserves some deference from the court. See National Railroad Passenger Corp. v. Boston and Maine Corp., 503 U.S. 407, 417-418 (1992) (citing Chevron U.S.A., Inc. v. National Resource Defense Council, Inc., 467 U.S. 837, 843 (1984); Conservation Law Foundation v. Federal Highway Administration, 24 F.3d 1465, 1480 (1st Cir. 1994); see also Nuclear Metals, Inc. v. Low-Level Radioactive Waste Management Board, 421 Mass. 196, 211 (1995)

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[17] At the time of the original sale to CRP, a predecessor statute, M.G.L. c. 121, § 26LL, applied. In contrast to M.G.L. c. 121B § 49(d), Section 26LL(d) referred only to federal "legislation," rather than to federal "legislation or regulations." In view of the currently applicable federal legislation, described infra, this distinction between the two statutory provisions is immaterial.

Manning v. Boston Redevelopment Authority, 400 Mass. 444, 453 (1987). However, because the BRA's interpretation of S 49 is informal, having been expressed in litigation rather than through rulemaking or adjudication, it does not merit full Chevron deference from the court. See Commonwealth of Massachusetts v. Federal Deposit Insurance Corporation, No. 96-1548, ___ F.3d ___, 1996 WL 720180, at *5 (1st Cir. Dec. 19, 1996). In any event, in this case the degree of deference due to the BRA's interpretation of § 49 is immaterial because its view of the statute is not only reasonable, it is right.

As described earlier, the development of West End Place is in part federally funded. The federal Fair Housing law, 42 U.S.C. § 3601 et seq., explicitly applies to such projects. 42 U.S.C. § 3603 (a)(1)(B). This law provides, among other things, that: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. 42 U.S.C. § 3601.

This means, among other things, that it is unlawful to discriminate against any person in the sale or rental of a federally funded dwelling based on race. 42 U.S.C. § 3604(b). As Justice Stephen Breyer, then writing for the First Circuit, recognized in 1987, the ending of discrimination is intended to be a "means toward truly opening the nation's housing stock to persons of every race and creed." N.A.A.C.P. v. Secretary of Housing and Urban Development, 817 F.2d 149, 155 (1st Cir. 1987). Thus, the federal Fair Housing law "reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases." Id.

Accordingly, there is now a statutory mandate that all federal agencies administer their programs "in a manner affirmatively to further" the purpose of the Fair Housing law.

42 U.S.C. § 3608(d). HUD has addressed its affirmative duties in regulations promulgated pursuant to the authority of this statute. Those regulations state in part:

> It is the policy of the Department to administer its FHA housing programs affirmatively, as to achieve a condition in which individuals of similar income levels in the same housing market area have a like range of housing choices available to them regardless of their race [or] color . . . . Each applicant for participation in FHA subsidized and unsubsidized housing programs shall pursue affirmative fair housing marketing policies in soliciting buyers and tenants, in determining their eligibility, and in concluding sales and rental transactions.

24 C.F.R. § 200.610 (1996). These regulations have the same force as statutes under the Supremacy Clause of the Constitution. See City of New York v. F.C.C., 486 U.S. 57, 63 (1988). Thus, federal law ordinarily requires the sort affirmative fair housing marketing policy aimed at attracting minority applicants that is being employed at West End Place. This requirement is reiterated in the Kemp Consent Decree concerning federally funded projects in the City of Boston.

It would obviously be a charade to affirmatively market the units at West End Place to attract minority applicants and then give former West End residents an absolute preference to all of those units because the vast majority of them are white. In any event, the federal government could not le-

gally, and as a practical matter would not, contribute to the project in the absence of a meaningful plan to market the units affirmatively to minorities. See, e.g., Gibbs Decl., ¶ 15. Thus, ironically, if plaintiffs were correct in contending that § 49 creates an enforceable right that former West End residents be assigned all of the units, it appears that vital federal funding would be forfeited, West End Place would not be constructed, and the opportunity it will afford for a meaningful number of former residents to return to the West End will be lost.

Section 49 does not, however, require this result. Subsection (d) expressly requires that urban renewal projects comply with the requirements of the federal law relating to federal funding. The BRA has given effect to both subsections (c) and (d) by requiring the Developer Defendants to affirmatively seek minority applicants while also recruiting former West End residents and reserving many of the units solely for them. Thus, the BRA has construed the statute in a manner consistent with its language, common sense, and the requirements of federal law.

If, however, the BRA instead interpreted § 49(c) as intending to give an absolute preference to former West End residents, it would still be obliged to obey the federal law and would have the power to modify that absolute preference. Under Article VI, Clause 2 of the Constitution, the laws of the United States are the "Supreme law of the land, binding on every citizen and every court and enforceable whenever jurisdiction is adequate for the purpose." Miles v. Illinois Central R. Co., 315 U.S. 69, 703-04 (1942). Consistent with this, as then Judge Breyer wrote, "a Housing Authority might even ignore its own regulations giving assignment priority in urban development projects to former site residents if it is convinced that doing so is the only way

to prevent a ghettoization of the area." N.A.A.C.P., 817 F.2d at 155; see also United States v. City of Parma, 504 F.Supp. 913, 920 (N.D.Ohio 1980) ("[W]here ordinances such as the one at issue have been found to thwart equal housing opportunity, such ordinances must give way to the dictates of federal policy."), aff'd in part and rev'd in part, 661 F.2d 562 (6th Cir. 1981), cert. denied, 456 U.S. 926 (1982); Otero v. New York City Housing Authority, 484 F.2d 1122, 1135 (2d Cir. 1973) ("To the extent that the regulation [regarding tenant preferences] conflicts with the Authority's duty to integrate, the regulation must yield."). As § 49(d), however, expressly contemplates that the statute will be administered in a manner consistent with federal law, reliance on the Supremacy Clause to resolve the instant case is not necessary.

Accordingly, the court concludes that the BRA properly construed § 49 in interpreting it in this case as creating a preference for former West End residents which is qualified by the requirements of federal law.[18] Therefore, Count I must be dismissed.

2. M.G.L. c. 121B, § 49 Does Not Create a Trust

Count II alleges that § 49 has the effect of creating a trust for the benefit of people displaced by urban renewal. This claim too is incorrect. Massachusetts law requires three elements to create an express trust: an intent to create a trust; a clearly identifiable trust res; and identifiable beneficiaries.

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[18] Indeed, plaintiff OWEHC evidently understood that federal law limited the preference which could be given to former West End residents when it entered into its Participation Agreement with LSA, which provides that such preference will be subject to "applicable . . . federal laws." Participation Agreement, Pl.'s P/ I Mem., Exhibit K, at 7.

Curran v. LeRoux, 157 B.R. 500, 509 (Bankr. D.Mass. 1993); Doucette v. Kwiat (In re Kwiat), 62 B.R. 818, 821 (Bankr. D.Mass. 1986), modified on other grounds sub. nom. Kwiat v. Doucette, 81 B.R. 184 (D.Mass. 1987). Plaintiffs do not satisfy the first two of these requirements.

First, "[b]ecause the creation of an express trust depends on the intention of the parties, an express trust can never be created by statute alone." Bamco 18 v. Reeves (In re Reeves), 124 B.R.5, 11 (Bankr. D.N.H. 1990). Plaintiffs do not allege, however, that anything outside of § 49 manifests a legislative intent to establish a trust for former West End residents.

Second, it is well-settled in Massachusetts law that "an interest which has not come into existence cannot be held in trust." New England Trust Co. v. Sanger, 337 Mass. 342, 348 (1958). Plaintiffs assert that the trust came into existence at the time the BRA took title to the land by eminent domain. Compl., at ¶ 90. Whether this was in 1960 or 1994, defendants correctly observe that "[a] number of events would have to occur subsequent to the BRA's taking of the land before the [statutory] preference would become operable and before the actual res would come into existence." BRA Reply, at 9. Those events include the sale of the land to a developer, the wholly discretionary decision to devote the land to residential use, and the actual construction of the buildings. Id.

Accordingly, Count II is being dismissed.

D. Plaintiffs' § 1983 Allegations Fail to State a Claim on Which Relief Can Be Granted

1. Plaintiffs Do Not Have a Right to Due Process in the Allocation of Units

Counts III and IV seek relief under 42 U.S.C. § 1983. In order to state a claim for relief under § 1983, a plaintiff must first show that he or she has "been deprived of a right 'secured by the Constitution and the laws' of the United States," and second, that the defendants deprived them of that right while acting under the color of state law. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 (1978).

Plaintiffs claim, in part, that they are being deprived of their property without due process. Compl., ¶¶ 96, 101. The property interests protected by the Due Process Clauses of the Fifth and Fourteenth Amendments do not derive from the Constitution itself, but from an independent source such as state law. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985) ; Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972); see also Lowe v. Scott, 959 F.2d 323, 334 (1st Cir. 1992). As explained previously, § 49 does not create a property right to an absolute housing preference for former residents of the West End.[19] Thus, plaintiffs do not have a constitutional right to due process regarding the allocation of units at West End Place. Therefore, those portions of Counts III and IV which seek relief for a failure to afford due process are being dismissed.

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[19] In addition, as described previously, in this case there are far more former West End residents who have applied for low and moderate-income units at West End Place than total units. It is evident that they could not all have a property right to a unit.

2. Plaintiffs Have Not Adequately Alleged a Denial of Equal Protection

Although not clearly articulated, Count III of the complaint also alleges that the BRA (but not the other defendants) violated plaintiffs' Fourteenth Amendment right to equal protection of the laws. It states that the BRA:

> By applying the Consent Decree of March 8, 1991, to the tenant selection process at West End Place thereby depriving the Plaintiffs of a benefit on the basis of racial classifications; [sic] interfered with, denied, and deprived the plaintiffs of their . . . equal protection rights contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. Sec. 1983.

Compl., ¶ 101 (emphasis added).[20] It is clear that the reference to the Consent Decree refers to the AFHMP required by that order, as well as by otherwise applicable federal law. Consequently, the essence of their allegation is that the AFHMP prescribes discrimination against plaintiffs in the allocation of a "benefit" based upon their race.

Plaintiffs, however, have failed to allege a viable equal protection claim for two reasons. First, their allegations are merely conclusory and fatally fail to allege, let alone set forth facts showing, the intent to injure the plaintiff class that is required to establish an equal protection violation. See, e.g., Coyne v. City of Somerville, 972 F.2d 440, 442 (1st Cir.

[20] The Fifth Amendment is not applicable because Count III pertains only to the BRA, rather than to the Federal Defendants.

1992). Second, the AFHMP as written only employs race with regard to the recruitment of applicants. Units are to be assigned in a colorblind fashion. Thus, if administered as written, the AFHMP would not deprive plaintiffs, because of their race, of any "benefit" subject to equal protection analysis. See, e.g., Shuford v. Alabama State Bd. of Educ., 897 F.Supp. 1535, 1553 (M.D.Ala. 1995).

With regard to the adequacy of the Complaint:

> [P]laintiffs are obliged to set forth in their complaint factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery under some actionable legal theory. The need is perhaps greater where allegations of civil rights violations lie at the suit's core.

The Dartmouth Review, 889 F.2d at 16. "Proof of a racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 2524, 265 (1977). This means that it must be alleged, and then shown, that a decisionmaker "selected or re-affirmed a particular course of action at least in part 'because of' and not merely 'in spite of' its adverse effects upon an identifiable group." Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979); see also Coyne, 972 F.2d at 445.

The Complaint in this case does not allege the required discriminatory animus. material because "'[d]espite the highly deferential reading . . . [courts] accord a litigant's complaint under Rule 12 (b) (6), [courts[need not credit bald assertions . . . [or] unsubstantiated conclusions . . . Coyne,

972 F.2d at 444 (quoting Correa-Martinez v. Arrillaga Belendez, 903 F.2d 49, 53 (1st Cir. 1990)). Rather, where, as here, plaintiffs "do not allege, and on the basis of pleaded facts cannot prove," the required discriminatory purpose, equal protection claims are properly dismissed. Id. at 445.

If this were the only defect in plaintiffs' equal protection claim, the court might afford them an opportunity to amend their complaint. There is, however, a more fundamental flaw in plaintiffs' theory.

Contrary to their contention, the AFHMP does not use race as a factor in allocating any "benefit." Nor does the AFHMP provide any "preference" in the assignment of units at West End Place based on race. Indeed, ironically, the only group preference is given to former West End residents who are overwhelmingly white. Thus, plaintiffs do not, and cannot, allege that the AFHMP as written "single[s] them out for unlawful oppression." The Dartmouth Review, 889 F.2d at 19.

These conclusions derive from the equal protection jurisprudence developed following the Supreme Court's decision in City of Richmond v. J.A. Croson, Co., 488 U.S. 469 (1989), the principles of which now apply to federal programs as a result of the Court's subsequent decision in Adarand Constructors, Inc. v. Pena, ___ U.S. ___, 115 S.Ct. 2097 (1995).

Adarand was a case brought by a contractor who lost a guard rail subcontract on a federally funded highway project to a competitor who was designated by the United States Small Business Administration as "disadvantaged" because of his race. 115 S.Ct. at 2102-04. The question in Adarand was whether this federal racial preference would be subject to the strict scrutiny that the Supreme Court had found in

Croson to be applicable to such preferences when they are created by state or local law.

More specifically, as explained by the Supreme Court in Adarand, Croson established that "'any [state or local] preference based on racial or ethnic criteria must necessarily'" be subject to strict scrutiny and "'the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification.'" 115 S.Ct. at 2111 (quoting Croson, 488 U.S. at 494) (emphasis added). Subsequently, however, in Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990), the Supreme Court suggested that "'benign federal racial classifications need only satisfy intermediate scrutiny." Id. at 2112. The primary purpose and effect of Adarand was to clarify that the constitutional standards enunciated in Croson for the evaluation of racial preferences established by state or local law are equally applicable to federal law. See id. at 2115-17; Id. at 2123-24 (Stevens, J. dissenting).

Plaintiffs here seem to suggest that the AFHMP for West End Place must be subject to strict scrutiny and that it cannot, as that test requires, be proven that the Plan is narrowly tailored to serve a compelling state interest, id. at 2113 -- in this case remediating proven past discrimination.

Following Croson, however, similar affirmative marketing, outreach, and recruitment programs directed at minorities have been characterized as "race neutral" and have not been subject to strict scrutiny analysis. See Ensley Branch, N.A.A.C.P v. Seibels, 31 F.3d 1548, 1571 (11th Cir. 1994) (labelling various minority recruitment and application fee waivers "race-neutral"); Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1557-58 (11th Cir. 1994) (describing minority outreach and recruitment programs for firefighting positions as "race-neutral"); Billish v. City of Chicago, 962

F.2d 1269, 1290 (7th Cir. 1992) (same), rev'd on other grounds, 989 F. 2d 890 (7th Cir. 1993) (en banc); Cf. South-Suburban Housing Center v. Bd. of Realtors, 935 F.2d 868, 883-84 (7th Cir. 1991) (short of concrete evidence of steering away of people who would otherwise apply, AFHMP not violative of Title VIII), cert. denied, 502 U.S. 1074 (1992); Alschuler v. HUD, 515 F.Supp. 1212, 1234 (N.D.Ill. 1981) (noting that "the purpose of the AFHMP is not to guarantee racial quotas or racially integrated projects . . . [but] to ensure that all racial groups in a marketing area have knowledge of and an opportunity to rent units in a particular building."), aff'd, 686 F.2d 472 (7th Cir. 1982); see also Robert G. Schwemm, Housing Discrimination: Law and Litigation § 11.2(2), at 11-11 n. 51 (listing other cases) & 11-27.

Although the affirmative recruitment of minority applicants is race-conscious conduct, as a recent decision from the Middle District of Alabama has cogently explained, such conduct alone does not constitute a "preference" within the meaning of Croson and Adarand that is subject to strict scrutiny because: "The crucial distinction. is between expanding the applicant pool and actually selecting from that pool. Expanding the pool is an inclusive act. Exclusion (based on race] . . . . can only occur at the selection stage." Shuford, 897 F.Supp. at 1553. Consistent with this analysis, the United States Department of Justice has expressed the view that: "Mere outreach and recruitment efforts . . . typically should not be subject to the Adarand standards." Department of Justice: Memorandum on Supreme Court's Adarand Decision, [June 28, 1995] Fair Empl. Prac. Cas. (BNA) 405:221, at 405:226 (May 1996) ("DOJ Memo"). The court finds this

reasoning persuasive and concludes that the West End Place AFHMP is not subject to strict scrutiny under Adarand.[21]

The court recognizes, however, that it is possible that a facially permissible outreach effort might operate in an illegally exclusionary manner. See South Suburban Housing Center, 935 F.2d at 883; Shuford, 897 F.Supp. at 553; DOJ Memo at 405:226 n. 13. For example, outreach and recruitment efforts might be so intense and focused as to create a pool of minority applicants only, or interested white applicants might be steered away from applying by the developer. However, as the Seventh Circuit has said, "[i]n the absence of concrete evidence" that the AFHMP is being manipulated to provide a preference to minorities, there is "nothing wrong with . . . attempting to attract [minorities] to housing opportunities they might not ordinarily know about and thus choose to pursue." South-Suburban Housing Center, 935 F.2d at 884.

In this case, it does not appear that plaintiffs allege that defendants are deviating from the AFHMP. However, when asked at the November 20, 1996 hearing whether there was additional discovery perceived to be necessary for the motion to dismiss to be fairly treated as one for summary judgment, plaintiffs' counsel identified discovery concerning the manner in which units were actually being assigned as the only issue. Tr. at 66-67.

Therefore, while the court is dismissing plaintiffs' equal protection challenge on the basis of the AFHMP, and tenant selection process it includes, as written, it is not clear whether this should result in the dismissal of this case with-

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[21] In view of the Kemp litigation and Consent Decree the AFHMP might survive strict scrutiny, but the court need not now decide this question.

out prejudice to a filing of a new action if plaintiffs later discover a proper basis, under Fed. R. Civ. P. 11, to allege that the AFHMP is intended to operate, and is actually operating, in an illegally discriminatory manner, or whether an amended complaint and discovery to address this issue in this case are appropriate.

Accordingly, the court will afford the parties an opportunity to confer and to inform the court: (a) whether they have reached some agreement to resolve the issue and, if not; (b) of their respective positions concerning it.

E. Counts V and VI Fail to Allege Viable Title VI and Title VIII Claims

Counts VI and V respectively allege that all defendants violated Title VI of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000d, and Title VIII of the Civil Rights Act of 1968 as amended, 42 U.S.C. § 3604. Each of these counts fails to state a claim upon which relief can be granted.

Count VI asserts that defendants violated Title VI by, among other things, "denying Plaintiffs benefits, and subjecting them to racial discrimination under a program receiving Federal financial assistance." Compl., ¶ 109.[22] As described previously, the AFHMP, including its tenant selection process, does not grant or deny any "benefit" based in whole or in part on race. Moreover, plaintiffs again have failed to plead the specific discriminatory intent required to

[22] The statute states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

establish a violation of Title VI. See Latinos Unidos de Chelsea en Accion v. Secretary of H.U.D., 799 F.2d 774, 783 (1st Cir. 1986) ("To prevail with a direct claim under [Title VI], plaintiffs must show that defendants acted with discriminatory intent.").

As indicated earlier, the Court of Appeals for the First Circuit has:

> consistently required plaintiffs to outline facts sufficient to convey specific instances of unlawful discrimination . . . .
>
> . . . It is only when ... conclusions are logically compelled, or at least supported, by the stated facts, that is, when the inference rises to what experience indicates is an acceptable level of probability, that "conclusions" become "facts" for pleading purposes.

The Dartmouth Review, 889 F.2d at 16.

The facts alleged in the Complaint, including the terms of the AFHMP to which it refers, would not if proven permit a finding of discriminatory intent. The Developer Defendants were responding to the requirements of federal law in adopting the AFHMP. More significantly, that Plan includes a special waiver from HUD permitting the BRA and the developer to set aside 55% of the units at West End Place for the overwhelmingly white former West End residents. Thus, the AFHMP plainly provides plaintiffs a preference rather than discriminating against them based on race. Therefore, they have not stated a viable Title VI claim with regard to the AFHMP as it is written.

Plaintiffs also fail to allege a sufficient Title VIII claim. Title VIII prohibits discrimination in the "terms, conditions and privileges in the sale or rental of a dwelling, or in the provision of services or facilities in connection therewith . . ." 42 U.S.C. § 3604 (b). In order to state a cause of action under this statute, plaintiffs need not allege discriminatory intent, but must at least allege some "practice" which "results in a disproportionate burden on members of a class protected by Title VIII." Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F.2d 252, 269 n. 20 (1st Cir. 1993). Generally, such disparate impact is illustrated through statistical evidence. See Mountain Side Mobile Estates Partnership v. Secretary of HUD, 56 F.3d 1243, 1251-52 (10th Cir. 1995). All that plaintiffs have alleged in this case, however, is that the "appl[ication]" of the AFHMP results in racial discrimination. Compl., ¶ 107. There is, for example, no allegation that white people are being discouraged from applying for units at West End Place. Compare South-Suburban Housing Center, 935 F.2d at 883-84. Indeed, once again, it is undisputed that white people who formerly resided in the West End are, under the AFHMP, being affirmatively recruited and will be given preference in the assignment of many units. As with the equal protection claim, it is possible that any deviations from the AFHMP might provide a proper basis for a Title VI or Title VIII claim. This question, however, is not now properly presented. Therefore, like the equal protection claim, the Title VI and Title VIII claims will be dismissed without prejudice to a possible motion to amend the complaint, if there is now a proper basis to do so under Fed. R. Civ. P. 11, or to the filing of a new case in the future if the evolution of events provides a proper basis to do so.

V. ORDER

In view of the foregoing, it is hereby ORDERED that:

1. Plaintiffs' claims under the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and Title VIII of the Civil Rights Act of 1968 are DISMISSED without prejudice to the possible filing of a motion to amend the complaint or the filing of a new case to assert that there has been, or will be, conduct which deviates from the West End Place Affirmative Fair Housing Marketing Plan as written and which violates any of these provisions. The remaining claims are DISMISSED with prejudice.

2. Judgment shall not enter immediately. Counsel for the parties shall confer and inform the court by January 31, 1997, whether plaintiffs wish to file a motion to amend the complaint aimed at curing the deficiencies in their equal protection, Title VI and Title VIII claims.

3. This case is otherwise hereby STAYED.

/s/
UNITED STATES DISTRICT COURT

APPENDIX D.

United States Court of Appeals

For the First Circuit

No. 97-1279

ALFRED RASO, ET AL.,
Plaintiffs, Appellants,

v.

MARISA LAGO, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Mark L. Wolf, U.S. District Judge]

Before
Selya, Boudin and Stahl,
Circuit Judges.

Chester Darling for appellants.

Saul A. Schapiro with whom Nina F. Lempert, Thomas Bhisitkul, Rosenberg & Schapiro, Merita Hopkins, Corporation Counsel, Kevin S. McDermott and Amanda P. O'Reilly, Assistant Corporation Counsel, City of Boston Law Department, were on briefs for appellees Marisa Lago, Director of

the Boston Redevelopment Authority, the Boston Redevelopment Authority, Thomas A. Menino, Mayor of Boston, City of Boston, Victoria L. Williams, Director of the Boston Fair Housing Commission, Boston Fair Housing Commission, Sandra Henriquez, Director of the Boston Housing Authority and Boston Housing Authority.

Rudolph F. Pierce with whom Lynne Alix Morrison, David W. Fanikos, Goulston & Storrs, P.C., Richard M. Bluestein, Paul Holtzman and Krokidas & Bluestein were on brief for Robert H. Kuehn, Jr., President of Keen Development Corp., and as Trustee of the Lowell Square Nominee Trust, Keen Development Corp., Reverend Michael F. Groden, Director of the Planning Office for Urban Affairs, Inc., and as Trustee of the Lowell Square Nominee Trust, Planning Office for Urban Affairs, Inc., Lowell Square Associates Joint Venture, Lowell Square cooperative Limited Partnership, Mark Maloney, President of Maloney Properties, Inc., and Maloney Properties, Inc.

Susan M. Poswistilo, Assistant United States Attorney, with whom Donald K. Stern, United States Attorney, was on brief for Henry G. Cisneros, Secretary of the Department of Housing and Urban Development and Department of Housing and Urban Development.

January 27, 1998

BOUDIN, Circuit Judge. The plaintiffs in this case are former residents of Boston's Old West End who were forced to relocate when their homes were taken by eminent domain

for urban renewal. They claim that Massachusetts law entitles them to first preference for tenancy of all new residential units built on the land, and that they are being denied this preference in a new development called West End Place because most former West Enders are white. The district judge dismissed the complaint, leading to this appeal.

The background facts are undisputed. In May 1956, the Boston Housing Authority, the forerunner to the current Boston Redevelopment Authority ("the BRA"),[1] prepared a plan for urban renewal of Boston's Old West End, a downtown neighborhood lying just north of Beacon Hill. The plan was approved as required under Massachusetts law, and in 1958, the BRA ordered a taking by eminent domain of a large area, displacing over three thousand households of diverse heritages, but including few African Americans.

The BRA executed a lease agreement with a private developer, Charles River Park, Inc. ("Charles River"). Over the next ten years, Charles River razed buildings in the Old West End and built offices, condominiums, and luxury residential units. The new buildings were either nonresidential or so expensive that very few of the former West Enders could afford to occupy them.

In 1970, the BRA terminated Charles River as the project developer and, in 1986, solicited proposals for the development of Lowell Square, located at the intersection of Lomasney Way and Staniford Street, the only remaining large undeveloped section of the Old West End. A proposal was submitted by the Lowell Square Cooperative Limited Part-

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[1] The BRA is an entity established by the Commonwealth of Massachusetts to undertake urban renewal projects and to relieve housing shortages. See Collins v. Selectmen of Brookline, 325 Mass. 562, 564-66 (1950).

nership (the "developer") to build a new development called West End Place at Lowell Square.[2]

The BRA eventually awarded the developer the redevelopment contract. One restriction in the agreement between the BRA and the developer mirrors a provision of Massachusetts law requiring the BRA to obligate the developer as follows:

> (c) to give preference in the selection of tenants for dwelling units built in the project area to families displaced therefrom because of clearance and renewal activity who desire to live in such dwelling units and who will be able to pay rents or prices equal to rents or prices charged other families for similar or comparable dwelling units built as a part of the same redevelopment; and
>
> (d) to comply with such other conditions as are deemed necessary to carry out the purposes of this chapter, or requirements of federal legislation or regulations under which loans, grants or contributions have been made or agreed to be made to meet a part of the cost of the project.

Mass. Gen. Laws ch. 121B, § 49 (1986).

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[2] The partnership later underwent a name change and, in addition, the complaint names other private entities and individuals associated with it. For convenience, all are referred to as "the developer."

The BRA also required that the developer work closely with former West Enders in developing the property. To that end, a number of former West Enders formed the Old West End Housing Corporation. This nonprofit entity and the developer signed a participation agreement, which stated, inter alia, that former West Enders would have first preference in the purchase or rental of residential units in West End Place, subject to applicable local, state, and federal laws.

The developer sought out numerous sources of financing, including government funding from local, state, and federal agencies. In particular, the federal Department of Housing and Urban Development ("HUD") funded a grant of $2.5 million for construction, and it also committed $7 million in rent subsidies for the low-income units in West End Place. See 42 U.S.C. § 1437f (1994). Like most federal housing assistance, these funds were contingent on compliance with federal fair housing requirements. See 24 C.F.R. §§ 1.5, 5.105 (1997).

One such requirement is that developer recipients of federal housing funds must carry out an affirmative program to attract minority, as well as majority, applicants; the pertinent regulation contemplates mailings to minority organizations, assurances of nondiscrimination, and like measures. Each applicant is required to set forth its "affirmative fair housing marketing plan" on a HUD form and secure its approval by HUD. See 24 C.F.R. §§ 200.620 (1997) in addition, HUD is subject to a 1991 consent decree based on a finding that HUD had failed to meet statutory obligations to ensure that the minority population of Boston had equal access to public housing. NAACP, Boston Chapter v. Kemp, No. 78-850-S (D. Mass. Mar. 8, 1991) (consent decree) . The consent decree provides that all Boston area HUD affirmative fair housing marketing plans "shall have as their goal and meas-

ure of success the achievement of a racial composition, in HUD-assisted housing located in neighborhoods which are predominantly white, which reflects the racial composition of the City [of Boston] as a whole." Id. at 2.[3]

In preparing its affirmative fair housing marketing plan, the developer attempted to reconcile the explicit statutory obligation of a first preference for former West Enders with HUD's consent-decree goal of a tenancy reflecting the makeup of the City of Boston. Minority races made up 41 percent of Boston's population, but according to HUD's estimate, only about 2 percent of the former West Enders. HUD indicated that it viewed an unqualified preference for former West Enders as contrary to federal fair housing requirements and the consent decree.

The developer, the government agencies, and the Old West End Housing Corporation submitted the matter to mediation. The mediator, a former United States Attorney for Massachusetts, proposed that former West Enders receive a preference as to 55 percent of the units in West End Place, and all other applicants have equal access to the remaining 45 percent. The developer and the agencies agreed; the Old West End Housing Corporation did not. Nevertheless, the mediator's solution was included in the developer's affirmative fair housing marketing plan, which HUD approved in 1996.

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[3] The consent decree ended lengthy litigation, which included an appeal to this court, over HUD's duties to foster integrated housing. See NAACP, Boston Chapter v. Pierce, 624 F. Supp. 1083 (D. Mass. 1985), vacated and remanded, NAACP v. Secretary of Hous. & Urban Dev., 817 F.2d 149 1st Cir. 1987), on remand, NAACP, Boston Chapter v. Kemp, 721 F. Supp. 361 (D. Mass. 1989). The decree provided that its provisions did not "constitute" and should not be "construed as" a quota.

The plan operates as follows. West End Place contains 183 residential units that fall into three rent-based categories: 58 "low-income" units (subsidized by HUD funds), 48 "moderate-income units," and 77 units to be rented at market rates. Under the plan, the developer is to give former West Enders first preference as to 101 of 183 units, that is, 55 percent of the total. These 101 units are unevenly distributed over the three rent categories: former West Enders have a preference as to 19 low-income units (33 percent), 24 moderate-income units (50 percent), and 58 market-rate units (75 percent).

The tenant selection works by lottery. Each preliminary application is assigned a random number. The applications are then separated into two pools: pool A contains applications from displaced former West Enders and pool B contains all other applicants. Then, for the low-income units, the top-ranked applicant from pool A is selected, followed by the two top-ranked applicants from pool B; this yields a total of 33 percent pool A applicants (33 percent former West Enders) in the low-income units. The process is then repeated until all 58 units are tentatively allocated.

The same lottery approach is used for the other two categories of apartments. For moderate-income units, the draw ratio is one-to-one (50 percent former West Enders); for the market-rate units, three-to-one (75 percent former West Enders). Applicants who have been selected in this process are then invited to complete a full application and undergo a more thorough screening process, which can include verifications of personal references and credit history. The same process can supply additional applicants if needed.

From August 26 to September 26, 1996, a real estate manager hired by the developer coordinated community outreach efforts to stimulate preliminary applications. The man-

ager also contacted former West Enders as well as the Old West End Housing Corporation. The manager eventually received 1,858 timely preliminary applications, 308 of which identified the applicants as former West Enders. Of the 308 former West Ender applicants, 12 identified themselves as black, one as Latino, and 19 did not identify their race.

On September 26, 1996, the individual plaintiffs--four former West Enders--filed a complaint in the district court challenging the tenant selection process and the plan on numerous grounds; they purported to represent former West Enders as a class. The Old West End Housing Corporation was also named as a plaintiff. The numerous defendants divide into four categories: the BRA and its director; HUD and its Secretary; the City of Boston and various of its officials; and, finally, the developer and other private parties associated with the development of West End Place.

On October 21, 1996, the plaintiffs filed an emergency motion for a preliminary injunction to halt the lottery, which was later withdrawn when the defendants agreed to let: the former West Enders' representatives monitor the lottery. In the lottery, which took place on October 29, 1996, two of the named plaintiffs received rankings in the lottery that make it unlikely that they will receive units in West End Place.

The developer and various other defendants moved to dismiss the complaint, Fed. R. Civ. P. 12 (b) (6), and the district court heard argument on the motion on November 20, 1996. On January 6, 1997, the district court issued an opinion dismissing many of the claims with prejudice. Raso v. Lago, 958 F. Supp. 686 (D. Mass. 1997). After the former West Enders declined to amend their complaint to allege discriminatory implementation of the plan--an opportunity offered by the district court--the district court dismissed all

claims with prejudice and entered judgment for the defendants on February 11, 1997.

The former West Enders appeal from the dismissal of only two of the numerous claims they made in the district court: first, a claim under 42 U.S.C. § 1983 that the plan violates equal protection principles because it comprises a forbidden racial classification, and second, a claim that section 49 creates a trust that subjects the BRA and developer to a trustee's fiduciary duties in favor of the former West Enders. There are also a few references to the Tenth Amendment and to federal statutes but these references are not seriously developed in plaintiffs' briefs.

We begin with section 1983, which pertinently provides that no person may deprive any person of his or her constitutional rights under color of state law. 42 U.S.C. § 1983. The City of Boston and the BRA are both "state actors," see Monell v. Department of Soc. Servs., 436 U.S. 658, 690 (1978), and the BRA played a central role in developing and fostering the plan challenged by plaintiffs. HUD is a federal entity not subject to section 1983, but its officials, are directly constrained by equal protection principles.[4]

In their complaint, the former West Enders allege that race was a motive for curtailing the statutory preference otherwise available to them. Specifically, the complaint cites the defendants, reliance upon the consent decree as comprising a racial purpose and goal and asserts that, as a result, the for-

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[4] The Fifth Amendment's Due Process Clause embodies the core of the equal protection doctrine, see Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954), and the Secretary of HUD, a named defendant in this case, is subject to suit for injunctive relief for violations of the Constitution. See, e.g., Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689-91 (1949); E. Chemerinsky, Federal Jurisdiction § 9.1.1, at 451-52 (1989).

mer West Enders were deprived of a benefit--a statutory preference for all of the apartments--based upon "a racial classification." In their appeal brief, plaintiffs' shorthand version is that the preference was curtailed "because" the former West Enders were predominantly white.

Factual assertions in a complaint are normally accepted as true for purposes of a motion to dismiss, see, e.g., Berner v. Delahanty, 129 F.3d 20, 25 (1st Cir. 1997); in addition, the defendants do not dispute that racial concerns and the consent decree prompted their effort to cut back upon the statutory preference. The reason is apparent: the former West Enders are almost entirely white, and without some limitation on the preference rights of former West Enders, HUD would have been funding subsidized apartments from which minorities were effectively excluded.

HUD apparently thought that this outcome would violate the consent decree and its statutory obligation to promote fair housing. See 42 U.S.C. §§ 3601-3619 (1994); 24 C.F.R. §§ 200.600-200.640 (1997). HUD may have misunderstood both the consent decree and the federal statute, but whether it did or not, its purpose to increase minority opportunities for apartments in West End Place by curtailing the statutory preference is evident. To this end, it appears that HUD simply declined to authorize funding unless and until some of the apartments were made available to applicants other than former West Enders.

This undenied racial motive distinguishes the case from those others involving facially neutral actions--like a zoning law or employee qualification test--where the state actor denies any racial purpose or concern.[5] But the plaintiffs are

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[5] See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270-71 (1977) (upholding a refusal to rezone property to allow construction of multi-dwelling buildings); Washington v.

mistaken in treating "racial motive" as a synonym for a constitutional violation. Every antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect a concern with race. That does not make such enactments or actions unlawful or automatically "suspect" under the Equal Protection Clause.

It is quite true that government action taken out of hostility to a racial group can be condemned out of hand, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886), but there is no allegation whatever in the complaint that the defendants were hostile to whites. Nor would any such motive be remotely plausible. Benign intentions do not immunize government action, but they substantially narrow the inquiry. The primary test is that any government action--regardless of benign intent--is suspect if it has been taken on the basis of a "racial classification"; in such cases, the classification must be justified by a compelling state interest and narrow tailoring. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995).

Despite the use of the "racial classification" label, the complaint alleges no facts that would bring that label into play. See Shaw v. Digital Equipment Corp., 82 F.3d 1194, 1216 (1st Cir. 1996). The term normally refers to a governmental standard, preferentially favorable to one race or another, for the distribution of benefits. E.g., Adarand, 515 U.S. at 226-27; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion). Yet under the plan adopted in this case, the apartments freed from the statutory preference are made available to all applicants regardless of race.

Davis, 426 U.S. 229, 247-48 (1976) (upholding a police department literacy exam that excluded mostly black applicants).

West End Place was built with federal help and its apartments made especially desirable through federal subsidies. It might not seem remarkable that the government should insist, as a condition of this investment, that a fair number of the apartments should be effectively open to application by tenants of all races. Nor have we been able to find any case where the government has been required to show a compelling interest, or narrow tailoring of remedies, for a condition framed so as to secure equal treatment of applicants regardless of race.

Language in a few Supreme Court decisions could be taken to mean that any action in which race plays a role is constitutionally suspect. However, the governmental actions in those cases were fundamentally different and more provocative. In Adarand, the statute gave special incentives to government contractors to hire minority subcontractors.[6] The redistricting cases concern state voting districts designed to concentrate minority voters and effectively to reserve seats for minority candidates.[7]

Taken by itself, HUD's action in this case is almost the opposite of the racial preferences that the Court viewed as questionable in Adarand and the redistricting cases. Here, the government's condition on federal funds was that some of the apartments--which otherwise would have almost automatically been occupied by whites--be made available to all applicants on a race-blind basis. We cannot view this as a

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[6] See Adarand, 515 U.S. at 205-06; see also Croson, 488 U.S. at 493-94; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279-80 (1986) (plurality opinion); R. Rotunda & J. Nowak, Constitutional Law § 18.10(a)(1) (2d ed. 1992 & Supp. 1997).

[7] See Bush v. Vera, 116 S. Ct. 1941, 1955 (1996) (plurality opinion); Miller v. Johnson, 515 U.S. 900, 906-09 (1995); Shaw v. Reno, 509 U.S. 630, 635-36 (1993).

"racial classification[]" reserving benefits for a favored race, Adarand, 515 U.S. at 235, or as "an effort to segregate the races," Shaw, 509 U.S. at 642-43.

Several other equal protection arguments made by the former West Enders need no lengthy discussion, either because they have been essentially abandoned on appeal or because they are clearly unpersuasive. The former category includes the former West Enders' attack on HUD requirements that the apartments be publicized in minority communities;[8] the latter includes the attempt to charge HUD with treating the consent decree's numerical "goal" as if it were a quota--a notion belied by the substantial preference retained for the former West Enders.

The story, however, is not quite over. It is one thing for HUD to insist that the apartments it subsidizes must effectively be open to all races; it would be quite another if HUD planned to impose this requirement only where the beneficiaries of the statutory preference were white. That, we think, would be government action based on a "racial classification" and would need to be narrowly tailored to serve a compelling government interest.

The difficulty is that we are dealing here with an ad hoc administrative action. Accepting the truth of the complaint's factual allegations, HUD's actions were prompted not by any general, racially skewed policy toward statutory preferences but by the peculiar interplay of Boston's consent decree, the

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[8] HUD's regulations require affirmative outreach in both majority and minority communities, see 24 C.F.R. § 200.620(a); and in any case outreach efforts are not the real source of the plaintiffs' problem--rather, it is the partial loss of their preference. The defendants are no less guilty of muddling the issue in their pretense that outreach efforts are all that are involved this case.

Massachusetts statute, and the respective racial makeups of the Boston population and the former West Enders. What HUD would do in some other, hypothetical case is unknown, but it is certainly not precluded, either by the consent decree or anything else, from challenging statutory preferences that exclude whites. Cf. Otero v. New York City Hous. Auth., 484 F.2d 1122, 1125 (2d Cir. 1973).

The plaintiffs have alleged no facts that, if proven, would reveal any secret discriminatory standard, pattern of past practice, or motive beyond the one HUD has admitted, namely HUD's concern that the preference in this instance, if unmodified, would restrict the apartments to whites and subject HUD to sanctions under the consent decree. Plaintiffs simply think that this purpose is enough to condemn HUD's action. For the reasons already given, we do not.

We turn now to plaintiffs' second and distinct claim on appeal that Mass. Gen. Laws ch. 121B, § 49, "has the effect of creating a trust for the benefit of people displaced by urban renewal." The district court ruled that there was no demonstrated legislative intent to create a trust and that the trust argument failed for a further more technical reason. See 958 F. Supp. at 700 (citing New Eng. Trust Co. v. Sanger, 337 Mass. 342, 348 (1958)). On appeal, plaintiffs devote five pages of their brief to discussing the requisites for trust creation under Massachusetts law.

Whether or not Massachusetts law created a trust for the former West Enders appears to us to be beside the point. If we assume arguendo that the former West Enders are entitled to, and can enforce, whatever priority is provided under section 49, subject always to superseding federal law, the trust concept is nothing more than a possible alternative remedy for enforcing any unpreempted rights that section 49 may

provide. The question to be answered, before remedies are even pertinent, is the extent of those rights.

By its terms section 49(c) creates a priority for displaced former residents, and subsection (d) arguably qualifies this priority by also obligating the developer to comply with "requirements of federal legislation or regulations under which loans, grants, or contributions have been made or agreed to be made to meet a part of the cost of the project." Mass. Gen. Laws ch. 121B, § 49(d). The defendants, position, adopted by the district court, is that such federal requirements--as a matter of Massachusetts law--qualify the statutory priority. Plaintiffs have not challenged this ruling on appeal.

The plaintiffs might have argued that the limitation adopted here is not itself a "requirement" of "federal legislation or regulations" but is merely a developer proposal that HUD has chosen to bless. Possibly, plaintiffs thought that this arguable distinction did not matter because a federal administrative measure, even if not statute or regulation, might override state legislation under the Supremacy Clause--assuming always that it was an authorized measure. This is by no means clear, but arguments on this point have not been made and need not be pursued.

In the district court, it appears that plaintiffs' trust argument may have been advanced primarily as an adjunct to a different constitutional claim, namely a claim that the plan in question impaired a property interest without due process or just compensation. The alleged trust, in this context, would be a way of expressing a claimed property interest. It is not obvious why a trust interest would be more entitled to this status than section 49's simple expression of a priority in favor of former tenants.

In all events, whether called a trust or something else, any property interest created by section 49(c) is arguably subject to section 49's own explicit reservation in section 49(d). As already noted, the plaintiffs on this appeal have not challenged the district court ruling that subsection (d) qualifies subsection (c) and also embraces the disputed plan. Taking these district court rulings as unchallenged, the trust argument adds nothing to the due process argument, which itself has not itself been renewed in the plaintiffs' briefs in this court.

This is a case that stirs conflicting sympathies, for those ousted from their West End neighborhood by "urban renewal" many years ago no less than for minorities wrongly denied fair housing opportunities in Boston. But we have properly sought to decide this appeal based upon Supreme Court precedent, as best we can discern it, recognizing that the case is a difficult and unusual one on the edge of developing law.

Affirmed.

Dissent follows.

Stahl, Circuit Judge, dissenting in part. There is for me considerable appeal in the majority's resolution of Plaintiffs' equal protection Claims. The governmental conduct these claims challenge involves a patently good faith and facially reasonable effort to accommodate the competing interests of two historic losers in Boston's housing wars: the racial and ethnic minorities entitled to invoke the protections of the consent decree in NAACP v. Kemp and federal fair housing laws, and the former West Enders, an ethnically diverse, lower middle class group which, in the name of "urban renewal," was forced from its neighborhood and could not afford to return.

Nonetheless, I cannot join the portion of the majority opinion that affirms the district court's pleadings based dismissal of the equal protection claims. While I agree with the majority that reverse discrimination claims like the present one are "on the edge of developing law," ante at 19, I do think it settled that, when the government withdraws benefits from a class of citizens because of the race or ethnicity of the class, courts are to scrutinize strictly the government's conduct so as to ensure that it furthers a compelling governmental interest and is narrowly tailored to advance that interest. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226-227 (1995). For the reasons that follow, I believe plaintiffs' complaint fairly alleges such a withdrawal of benefits. And I do not see how we can, at this stage of the litigation, conclude that such a withdrawal of benefits passes strict scrutiny.

The complaint alleges that the governmental defendants curtailed plaintiffs, statutory preference in order to comply with the consent decree in NAACP v. Kemp. See ante at 11. Because the purpose of that consent decree is "the achievement of a racial composition, in HUD-assisted housing lo-

cated in neighborhoods which are predominantly white, which reflects the racial composition of the City of Boston as a whole," id. at 6, a reasonable inference to be drawn from plaintiffs' complaint, see Aybar v. Crispin-Reyes, 118 F.3d 10, 13 (lst Cir. 1997) (reasonable inferences are to be drawn in favor of the party opposing a Fed. R. Civ. P. 12 (b)(6) motion), is that defendants acted as they did because the putative plaintiff class was predominantly white. The fact that defendants "do not dispute" this accusation, ante at 11, only underscores our obligation to subject defendants' conduct to strict scrutiny, see Adarand, 515 U.S. at 224 ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.").

The majority reaches a contrary conclusion--that strict scrutiny does not apply--because it regards the facts plaintiffs have pleaded in support of their equal protection claims insufficient to describe a "racial classification." See ante at 13-16 (holding that this case is outside the principle of Adarand). In reaching its conclusion, the majority emphasizes the effect of curtailing the preference on non parties to this litigation, see ante at 13 ("[T]he apartments freed from the statutory preference are made available to all applicants regardless of race."), and the defendants' intent in enacting the curtailment, see id. at 14 ("It might not seem remarkable that the government should insist . . . that a fair number of the apartments should be effectively open to application by tenants of all races."). The majority also reads one complaint to allege only that defendants acted as they did because plaintiffs are racially identifiable; it does not read the complaint to allege that defendants acted as they did because plaintiffs are white. Id. at 15.

Taking this last point first, I simply disagree with the majority's reading of the complaint. The complaint does not allege that the preference was curtailed because plaintiffs are racially monolithic; it alleges that the preference was curtailed because of the consent decree. And, as I have stated, because the consent decree operates only in favor of racial and ethic minorities, it could not be read to require curtailment of the preference if the former West Enders were Predominantly black. Thus, for purposes of evaluating defendants Rule 12(b)(6) motion, I believe we must read into the complaint the allegation the majority believes necessary to trigger strict scrutiny, see ante at 16: that defendants would not have acted as they did had the plaintiff class been predominantly of color. See Aybar, 118 F.3d at 13; see also Conley v. Gibson, 355 U.S. 41, 47-48 (1957) (Fed. R. Civ. P. 8 (a)(2) does not require a complaint to set forth specific facts in support of a general allegation of discrimination).

Even if the majority has properly construed the complaint, I believe plaintiffs, equal protection claims are sufficient to withstand a Rule 12(b)(6) motion and to trigger strict scrutiny. In the redistricting cases, the Supreme Court has emphasized that government action which subordinates race neutral considerations to an overriding racial purpose is constitutionally suspect: "We recognized in Shaw[v. Reno, 509 U.S. 630 (1993)] that, outside the distracting context, statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." Miller v. Johnson, 515 U.S. 900, 913 (1995) (affirming the invalidation, under equal protection principles, of a Georgia congressional redistricting plan designed to increase the number of majority black districts in Georgia) (citation omitted). It remains to

be seen whether the Court will press this principle to its outer limit and strictly scrutinize even governmental conduct which, though predominancy motivated by a racial purpose, would not appear to burden any person because of his or her race--e.g., a public university's efforts at recruiting fully qualified applicants of color for its first year law school class. But it seems apparent that defendants' lack of hostility towards whites in particular, cf. ante at 13, does not shield their conduct--which has burdened plaintiffs because they are, as a group, racially identifiable--from the most searching judicial inquiry. See Miller, 515 U.S. at 913.

This leads to a final point. I think the majority runs afoul of Adarand in concentrating its focus so heavily on both defendants' intent and the effect of defendants' actions on non-parties to this case. The Supreme Court has squarely rejected the argument that classifications motivated by "benign" considerations should not be scrutinized strictly. See Adarand, 515 U.S. at 226. And though this case does appear unique in that the government conduct at issue is more a withdrawal of a special benefit from whites than a giving of special benefits to members of minority groups,[9] the clear import of Adarand is that it is the plaintiff's "personal right to equal protection of the laws," 515 U.S. at 227, and not some non-party's interest in competing for that which would be the plaintiff's but for his or her race, that is constitutionally safeguarded. Thus, in evaluating the constitutionality of defendants' conduct, we must not look to its effect and motivation with respect to others; we must look at its effect and motivation

[9] It is important to note that there is no indication that the benefit originally given (i.e., the full preference) was given to Plaintiffs because they were predominantly white; rather, the preference was given because plaintiffs were ousted from their homes.

with respect to plaintiffs. And here, quite clearly, defendants' conduct has had the effect of depriving plaintiffs of a benefit and was prompted by the fact that plaintiffs are mostly white.

Because defendants, conduct should have been strictly scrutinized, their motion to dismiss plaintiffs' equal protection claim should have been denied and they should have been required to produce evidence that their conduct was narrowly tailored to advance a compelling governmental interest. See Adarand, 515 U.S. at 227 (reciting the components of the strict scrutiny inquiry) ; see also Aiken v. City of Memphis, 37 F.3d 1155, 1163 (6th Cir. 1994) ("When, as here, a race-based affirmative action plan is subjected to strict scrutiny, the party defending the plan bears the burden of producing evidence that the plan is constitutional. Plaintiffs should then have been put to the burden of proving its unconstitutionality of defendants' conduct. See Aiken, 37 F.3d at 1162 ("The party challenging [a racially-preferential] plan retains the ultimate burden of proving its unconstitutionality."). To the extent that the majority has reached a different conclusion, I most respectfully dissent.

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IN THE

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v.

MARISA LAGO, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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16 pp

QUESTIONS PRESENTED

I. Whether the state agency charged with interpreting M.G.L. c. 121B, § 49, as well as the lower federal courts were correct to interpret M.G.L. c. 121B, § 49 such that the petitioners do not have a right to absolute preference in all the units at West End Place because it was financed largely by federal housing money.

II. Whether the respondents' decision to market units within West End Place to the general public so as not to frustrate the purposes of federal housing law deprived the petitioners of a "right" to absolute preference in the West End Place.

LIST OF PARTIES

PETITIONERS:

ALFRED J. RASO, JOAN BELINSKI CALABRO, FRANK LEVINE, THEODORE RICHARD NEDD on behalf of themselves and all other displaced persons from the West End of Boston, and THE OLD WEST END HOUSING CORPORATION.

RESPONDENTS:

State Respondents
MARISA LAGO, Director of the Boston Redevelopment Authority and the BOSTON REDEVELOPMENT AUTHORITY

Federal Respondents
HENRY CISNEROS, Secretary of HUD, and the DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Municipal Respondents
THOMAS M. MENINO, Mayor of the City of Boston, the CITY OF BOSTON, VICTORIA L. WILLIAMS, Director of the Boston Fair Housing Commission, and BOSTON FAIR HOUSING COMMISSION

Developer Respondents
ROBERT H. KUEHN, JR., President of Keen Development Corporation, and as trustee of the LOWELL SQUARE NOMINEE TRUST, and KEEN DEVELOPMENT CORPORATION; and THE REVEREND MICHAEL F.

GRODEN, Director of the Planning Office of Urban Affairs, Inc., and THE PLANNING OFFICE OF URBAN AFFAIRS, INC., and LOWELL SQUARE ASSOCIATES, JOINT VENTURE; and LOWELL SQUARE COOPERATIVE LIMITED PARTNERSHIP; and MARK MALONEY, President of Maloney Properties, Inc., and MALONEY PROPERTIES, INC.

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STATEMENT OF THE CASE

Municipal respondents are satisfied with the Petitioner's statement of the case and prior proceedings. Pursuant to Supreme Court Rule 15 those sections are not repeated in this brief.

SUMMARY OF THE ARGUMENT

The respondents submitting this brief in opposition are: the City of Boston; Thomas M. Menino as he is the Mayor of the City of Boston; Victoria L. Williams as she is Director of the City of Boston's Fair Housing Commission; and the City of Boston Fair Housing Commission. These respondents are in fact one legal entity which is the City of Boston, a municipal corporation under the laws of the Commonwealth of Massachusetts. For brevity, these respondents will be referred to as the municipal respondents.

The municipal respondents respectfully oppose the issuance of a writ of certiorari to the United States Court of Appeals for the First Circuit for reasons more fully expressed in the argument following this introduction. The primary reason why this Court should not grant certiorari is that the petitioners were not deprived of a "right" to a preference in federally subsidized housing because the very state statute which provides for that preference also subordinates that preference to "conditions as are deemed necessary to carry out the purposes of . . . federal legislation or regulations under which loans, grants or contributions have been made . . . ." M.G.L. c. 121B, § 49(d). Even without this explicit condition in the statute, the Supremacy Clause would have subordinated the petitioners' preference to federal legislation and regulations.

Federal housing money was used to develop West End Place and to offer many of its units at subsidized rates. The "purpose" of federal fair housing legislation and regulations is to offer equal opportunity for all to the benefit of subsidized housing. To achieve this purpose, it is a requirement of federal law for developers to adopt an Affirmative Fair Housing and Marketing Plan (AFHMP). The trial court in

this case made this determination of law and the petitioners have never appealed this issue. (Rec. Ap. 29d) The purpose of affirmative housing regulations is to encourage people to explore housing opportunities in areas they would not ordinarily consider because of location.

In any event, pivotal to the petitioners' argument is their contention that they had an absolute right of preference to all units at West End Place. The state law is clear that petitioners had no such preference. Unfortunately, a lot of ink has been wasted addressing petitioners mantra that "but for" being considered white they would have a preference to all units within West End Place. Petitioners' argument is wrong. The real issue is that the petitioners may have had a preference "but for" federal legislation and regulations requiring equal housing opportunity for the public at large and promoting housing access for persons who would not ordinarily apply for housing but for location. It is obvious that the preference sought by petitioners is extinguished by operation of M.G.L. c. 121B, § 49(d) because such preference is contrary to the very "purpose" of federal legislation and regulations.

This case concerns an ad hoc decision by the governmental respondents to simply adhere to the purposes of federal housing law because the money used to develop the housing units was, for the most part, federal housing money. There is no conflict between the decision of the Court of Appeals for the First Circuit in this case and any other decision in any other circuit or state. This Court should deny the plaintiffs' petition for certiorari.

ARGUMENT

I. THE PLAINTIFF-PETITIONERS CLAIMED "RIGHT" TO ABSOLUTE PREFERENCE TO ALL UNITS IN THE FEDERALLY FUNDED WEST END PLACE DOES NOT EXIST UNDER THE LAWS OF MASSACHUSETTS.

The petitioners do not challenge the lower court decision that the "rights" petitioners claim under the M.G.L. c. 121B, § 49 are qualified by the overriding federal requirements of fair housing law, as explicitly stated in M.G.L. c. 121B, § 49(d). *Raso* v. *Lago*, 135 F.3d 11, 18 (1998) (App. 77a). Further, the petitioners did not challenge the trial court's interpretation of that statute on appeal in the First Circuit. The trial court found that petitioners' rights were illusory because those rights were subordinate to the purpose of federal housing legislation and regulations. *Raso* v. *Lago*, 958 F. Supp. 686 (D. Mass. 1997). (App. 77d and 46a-47a). Petitioners argue in their petition to this Court that M.G.L. c. 121B, § 49(c) is a race neutral statute and is not unconstitutional or presumptively unfair, therefore the statutory preference ought to stand. (Pet. pg. 19). Petitioners cite *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256 (1979) to support their position. Petitioners' argument is misplaced because the court in this case did not strike or invalidate a state law. Rather, the court correctly viewed clauses (c) and (d) as in *pari materia*. The court merely read the plain language of M.G.L. c. 121B, §§ 49(c) and (d) as not providing the petitioners with the benefit of absolute preference to the units at West End Place. 135 F.3d *at* 18.

The trial court offered a detailed analysis of the correct interpretation of M.G.L. c. 121B, §§ 49(c) and (d) and found that the respondent BRA is the state agency charged with

administering that statute and the BRA interpreted § 49(d) as qualifying and limiting the preference given in section (c). The trial court found the BRA's interpretation of the statute not only reasonable but right. By making its own judgment on the interpretation of state law, the trial court made any questions regarding the degree of deference to be accorded to the BRA's interpretation immaterial. *See* 958 F. Supp. at 698. The petitioners have never challenged this interpretation of the statute. Indeed, no reasonable challenge to this interpretation of the statute can be made.

In plain language the petitioners do not have a constitutionally protected "right" to preference in all units within the West End Place development. Therefore, the petitioners cannot claim that this "right" to absolute preference was taken away from them.

II. THERE WAS NO RACIAL CLASSIFICATION IN THIS CASE.

The majority opinion of the panel in the First Circuit found no racial classification, as this term is understood in the context of civil rights litigation, present in this case. As explained by the First Circuit:

> Despite the use of the "racial classification" label, the complaint alleges no *facts* that would bring that label into play. The term normally refers to a governmental standard, preferentially favorable to one race or another, for the distribution of benefits. Yet under the plan adopted in this case, **the apartments freed from the statutory preference are**

> **apartments available to all applicants regardless of race.**
>
> West End Place was built with federal help and its apartments made especially desirable through federal subsidies. It might not seem remarkable that the government should insist, as a condition of this investment, that a fair number of apartments should be effectively open to application by tenants of all races. Nor have we been able to find any case where the government has been required to show a compelling interest, or narrow tailoring of remedies, for a condition framed so as to secure *equal* treatment of applicants regardless of race. (citations omitted) (italics in original, boldface supplied) 135 F.3d *at* 16.

The glaring flaw in the petitioners' argument is that petitioners view the government respondents' concern that federal law requires an AFHMP be used for providing equal access to all people to federally financed housing as a "racially motivated" decision which warrants strict scrutiny. (pet. pg. 17). Under petitioners' reasoning all decisions under civil rights laws would become suspect even if that decision was only to adhere to federal requirements that housing be marketed to the general public in a race neutral fashion.

Addressing this flaw in petitioners' reasoning the majority opinion of the First Circuit panel noted "the plaintiffs are mistaken in treating 'racial motive' as a synonym for constitutional violation. Every anti-discrimination statute aimed at racial discrimination and every enforcement measure taken under such a statute, reflect a concern with race. That does

not make such enactments or actions unlawful or automatically "suspect" under the Equal Protection Clause". 135 F.3d *at* 16.

There was no "racial classification" in this case in the sense that term is understood in civil rights litigation as "reserving benefits to a favored race" or "an effort to segregate the races". *Id. at* 17 (citations omitted). This case is simply, very simply, about reasonable governmental officials being dutiful to the highest laws of this nation. The concern in this case was to follow the law which commands that all people, regardless of race, shall have the equal opportunity to partake in a government program covered by the Fair Housing Act. Petitioners are wrong to argue that racial concerns were involved or that respondents' decision is subject to strict scrutiny analysis.

It may well be that all civil rights legislation is enacted with concern for race as well as ethnicity, religion, sexual orientation, people with disabilities, and other prejudices which interfere with equality and justice for all. It is evident that the Fair Housing Act was enacted to address some of these concerns. See generally, 114 Cong. Rec. 2279 & 9591. In this case however, the motive of the municipal respondents was simply to adhere to federal law which, among other things, requires an AFHMP.

The trial court specifically found that ". . . the AFHMP does not provide for consideration of race in establishing priorities or assigning units . . . priority for the assignment of units is, under the AFHMP, established by a lottery which does not take race into account . . . no one will be assigned a unit in whole or in part because of his or her minority status". 958 F. Supp. at 698 (Pet. App. at 34a).

On the subject of racial classification mention should be made of Judge Stahl's dissenting opinion in this case. Judge

Stahl read into the Complaint the allegation that the "preference to all units at West End Place was not given because the petitioners are white but would have been given if the petitioners were black". 135 F.3d *at* 19. That allegation is contrary to the law and the record in this case. The First Circuit majority opinion correctly cited the laws and regulations applicable to the federal funding for the West End Place including: 42 U.S.C. § 1437f (1994) (subsidies for low-income units); 24 C.F.R. §§ 1.5-5.105 (1997) (requiring funded projects to comply with federal fair housing requirements); 42 U.S.C. §§ 3601-3619 (1994) and 24 C.F.R. §§ 200.660-200.640 (1997). 135 F.3d *at* 13, 14 *and* 16. It is a grievous mistake for Judge Stahl to read into the Complaint the allegation that if the West Enders were black they would have a full preference to West End Place units because such an outcome would be contrary to the fair housing laws. The trial court and the BRA determined that M.G.L. c. 121B, § 49(d) subordinates the preference given in § 49(c) because the purpose of federal fair housing law is to allow equal access to all people. That interpretation of Massachusetts law is correct and has nothing to do with whether the plaintiffs are, as a group, identified as black, white, or diverse.

It seems Judge Stahl was somewhat swayed to read this allegation into the Complaint because the provisions of the Consent Decree (App. pp. 1a-17a) speak of legal remedies to address needs of minorities. However, unlike the fair housing provisions, supra, the Consent Decree concerned a private action by a class of minorities. Therefore, the remedies were geared to remedy damage done *to that class*. The dissent noted that "the consent decree operates only in favor of racial and ethnic minorities . . ." *Id. at* 19. To a large degree, this is correct. However, even the Decree is mindful of the broader implications of federal fair housing laws when it

requires owners and operators of government-assisted housing to pursue affirmative fair housing marketing policies in soliciting buyers and tenants; and that "nothing herein shall constitute or be construed as requiring a quota." [Decree II.B.2.(d)] Clearly, federal fair housing laws, under which the Consent Decree was brought, is the overriding authority and does not limit protections to racial or ethnic minorities. That body of law protects all citizens. It is respectfully suggested that the dissent may have incorrectly read into the Complaint an allegation which is contrary to the facts and to prevailing law. The fact is that the claim of the former West Enders to preference for 100% of the units at West End Place is not legally sound because fair housing laws require equal housing opportunity and do not permit public officials and property owners to limit eligibility or preference for tenancy in government-assisted housing solely to former or current residents of any neighborhood or community, regardless of race.

It should be noted that the former West Enders were granted preference for 55% of the units at West End Place. This resulted because the municipal respondents were empathetic to the plight of the West Enders and attempted to accommodate the concerns of the West Enders while adhering to the obligations of the federal housing laws. The 55% preference resulted from the attempt to mediate this issue. *See, Raso* v. *Lago*, 135 F.3d 11 (1998).

CONCLUSION

For all the foregoing, the municipal respondents oppose the petition for writ of certiorari to the First Circuit Court of Appeals.

Respectfully submitted

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FOR THE FIRST CIRCUIT.

RESPONDENTS BOSTON REDEVELOPMENT AUTHORITY'S AND MARISA LAGO'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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June 26, 1998

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QUESTION PRESENTED

Whether this Court should deny the Petition for Writ of Certiorari where the United States Court of Appeals for the First Circuit correctly affirmed the Massachusetts District Court's dismissal of the Petitioners' case based on an interpretation of Massachusetts law, and where this case presents a complex and unique intersection of federal statutes and regulations, Massachusetts state law and a consent decree entrered into by the Department of Housing and Urban Development and other parties who are not parties to the instant case?

LIST OF PARTIES

The Petition correctly lists the named parties in this case, however, the statement that the named Petitioners appear "on behalf of...all other displaced persons from the West End of Boston" is premature and inaccurate. Such class was never certified in this case, and therefore the named Petitioners appear in this case on behalf of themselves only.

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OPINIONS BELOW

The Opinions Below section of the Petition is accurate with the exception of the reference to proceedings in NAACP v. Kemp, United States District Court, District of Massachusetts, Docket No. 78-850S, and the Petitioners' prior involvement in that case. The Kemp case involved separate parties, and that decision is not subject to review on this Petition.

STATUTES INVOLVED

This case involves the interrelationship between Massachusetts General Laws Chapter 121B, §49 (citations in this Opposition to Massachusetts General Laws will be referenced as "M.G.L. c."), which is set forth as follows:

> If an urban renewal agency shall sell or lease any property acquired by it for an urban renewal project, the terms of such sales or leases shall obligate the purchasers or lessees, (a) to devote the land to the use specified in the urban renewal plan for said land; (b) to begin the building of their improvements within a reasonable time; provided, however, that, with respect to any improvements of a type which any federal agency, as defined in subsection (b) of section 3 of the Federal Property and Administrative Services Act of 1949, as amended, is otherwise authorized to make, this clause shall apply to such federal agency only to the extent it is authorized, and funds have been made available, to make the improvements involved; (c) to give preference in the selection of tenants for dwelling units built in the project area to families displaced therefrom because of clearance and renewal activity who desire to live in such dwelling units and who will be able to pay rents or prices equal to rents or prices charged to

other families for similar or comparable dwelling units built as part of the same redevelopment; and (d) to comply with such other conditions as are deemed necessary to carry out the purposes of this chapter, or requirements of federal legislation or regulations under which loans, grants, or contributions have been made or agreed to be made to meet part of the cost of the project. Nothing in this chapter shall be construed as limiting the power of an urban renewal agency in the event of a default by a purchaser or lessee of land in an urban renewal project to retake title to and possession of the property sold or leased free from the obligation in the conveyance of the lease thereof.

This case also involves federal statutes including 42 U.S.C. §2000d, §3601, §3604 and §3608(e)(5), and federal regulations including 24 C.F.R. §200.610, §200.620 and §850.151(g). The foregoing federal statues and regulations are set forth verbatim in the appendix attached hereto

STATEMENT OF THE CASE

In 1956 the Boston Housing Authority (the predecessor to the respondent Boston Redevelopment Authority - "BRA") prepared a land assembly and redevelopment plan (the "Urban Renewal Plan") covering several blocks of the West End of the city of Boston (the "Urban Renewal Area"). (Pet.App. 65a.) (Reference to pages in the Appendix to the Petition for Writ of Certiorari will be referenced to herein as "Pet.App. __"). In 1959 the BRA, in implementing the Urban Renewal Plan, took title by eminent domain to the land comprising the Urban Renewal Area. (Pet.App. 25a.)

M.G.L. c.121B, §49(c), provides (in pertinent part):

> If an urban renewal agency shall sell or lease any property acquired by it for an urban renewal project, the terms of such sales or leases shall obligate the purchasers or lessees, . . .(c) to give preference in the selection of tenants for dwelling units built in the project area to families displaced therefrom because of clearance and renewal activity who desire to live in such dwelling units and who will be able to pay rents or prices equal to rents or prices charged to other families for similar or comparable dwelling units built as part of the same redevelopment... M.G.L. c.121B, §49(c).

The same statutory section provides in subsection (d), however, that the urban renewal agency shall obligate the purchasers or lessees:

> ...(d) to comply with...requirements of federal legislation or regulations under which loans, grants, or contributions have been made or agreed to be made to meet a part of the cost of the project.

M.G.L. c.121B, §49(d). M.G.L. c.121B, §49(c) does not provide that the former West End Residents have a "right of return" to the Urban Renewal Area, nor does it provide that they had any right to have affordable housing or *any* housing constructed in the project to facilitate their return to the neighborhood.[1]

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[1] The inclusion of affordable housing as part of the redevelopment of the Urban Renewal Area was a subject of Commissioner of the Department of Community Affairs v. Boston Redevelopment Authority, 289 N.E.2d 867 (Mass. 1972). In that case, the Massachusetts Department of Community Affairs (DCA) asserted that various amendments the BRA had authorized to the Urban Renewal Plan

The eminent domain taking of the Urban Renewal Area occurred over forty years ago. Since that time, and prior to the construction of West End Place, more than 2,200 new housing units were built in the Urban Renewal Area by Charles River Park, Inc. (or, depending on the particular parcel, business entities affiliated with it--collectively "Charles River Park"), the corporation originally designated by the BRA to redevelop the land. See Commissioner of the Department of Community Affairs v. Boston Redevelopment Authority, 289 N.E.2d 867, 878, fn. 9 (Mass. 1972)(hereinafter, "DCA"), which provides an historical background to the redevelopment of the West End Urban Renewal Area. Any "preference" available to the Petitioners under G.L. c.121B, §49(c) was, is, and always has been, available to them and other former West Enders with respect to these units. See Id. at 870.

Despite its construction of over 2,200 dwelling units on the bulk of the land comprising the Urban Renewal Area, however, Charles River Park did not exercise its development rights with respect to one parcel known as Lowell Square, which for years remained the last undeveloped parcel of the West End Urban Renewal Area. As a result, the BRA terminated such rights so that it could designate a new project and new developer for the site. The termination of Charles River Park's development rights became the subject of a lawsuit, in which the BRA prevailed in 1990. See Charles River Park, Inc. v. Boston Redevelopment Authority, 557 N.E.2d 20 (1990).

The BRA designated respondents Lowell Square

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providing for additional housing units to be built in the project were "illegal" due *inter alia* to lack of sufficient provisions for low and moderate income housing. The Massachusetts Supreme Judicial Court ruled that the was no requirement in the West End Urban Renewal Plan that low and moderate income housing be constructed as part of the project. Id. at 879

Associates and Lowell Square Cooperative Limited Partnership (the "Developers") to develop the West End Place project ("West End Place") as a mixed-income, cooperatively owned, housing development. (Pet.App. 26a). The 183 units comprising West End Place are the last of the over 2,300 housing units ultimately constructed in the West End Urban Renewal Area. To finance the project and in order to include low and moderate income housing units, the Developers sought construction grants and other subsidies from the federal government pursuant to various HUD-administered funding programs that existed at that time.[2] Under the terms of such federal programs, however, the grant of funds was conditioned on compliance with a number of requirements premised on federal fair housing statutes and regulations. (Pet.App. 67a); see e.g. 42 U.S.C. §2000d, §3601, §3604, §3608(e)(5), 24 C.F.R. §200.610, §200.620, §850.151(g). In administering these federal housing assistance programs, HUD is charged not simply with ensuring that federal funds would not be used to facilitate segregated housing patterns, but further to affirmatively implement the policies behind the fair housing statutes and regulations. 42 U.S.C. §3608(e)(5). Petitioners in this case neither challenge the validity of those statutes and regulations, nor do they argue that such statutes and regulations do not apply in this case.

In order to even meet the application requirements for the federal funds ultimately used to subsidize the project, the developers had to prepare for HUD's approval an Affirmative Fair Housing Marketing Plan ("AFHMP").

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[2]Federal funding was received from several federal programs, including the Section 8 Community Investment Demonstration Program, enacted by the HUD Demonstration Act of 1993, P.L. 103-20, §6, 107 Stat. 1148, reprinted in 42 U.S.C.S. §1437f, at 50 (Supp. May, 1996), and the HOME Investment Partnership Act of 1990, 42 U.S.C. §§2471 et seq. (Pet.App. 28a).

(Pet.App. 67a); see 24 C.F.R. §200.610. §200.620 (1996). In Boston, the AFHMP requirement was the subject matter of a Consent Decree[3] entered into after a decade long lawsuit against HUD, which was found to have failed to comply with its obligations under federal statutes[4] and regulations by *inter alia* failing to "condition its provision of federal funds. . on construction of affordable integrated public housing." NAACP, Boston Chapter v. Kemp, 721 F.Supp. 361, 365 (D.Mass. 1989). (See Pet.App. 26a-27a).

The AFHMP was strictly a marketing mechanism designed to attract minority participation in the application process. While the objective of the AFHMP marketing process was to produce a community at West End Place that reflected the racial and economic diversity of the city of Boston at large, it did *not* include any minority quota or set-asides to achieve such goals. Rather, all units were awarded through a strictly race-neutral lottery process. (Pet.App. 27a-29a, 32a-34a).

While acknowledging the difficulties many former West End residents had experienced back in the 1950s, the BRA and the Developers had to comply in a meaningful way with the requirements of federal funding necessary for the mixed-income West End Place project, and necessary for the

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[3]The Petitioners state in their Statement of the Case that the Consent Decree in NAACP, Boston Chapter v. Kemp, No. 78-850, slip op. (D. Mass, March 18, 1996) contains a "sunset clause of March 8, 1996." This is a factual inaccuracy; in fact, the Consent Decree provides only that either of the parties to that lawsuit "may" take measures to terminate the decree after five years; however, the termination is not automatic, and none of the parties have exercised the option to terminate the decree. (Pet.App. 15a-16a).

[4]42 U.S.C §3608(e)(5) requires HUD and its grantees to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter [entitled "Fair Housing"]." (Pet.App. 27a, fn. 3).

creation of the affordable housing units desired by the West Enders. (Pet.App. 48a-49a.) In order to preserve a preferential treatment for former West End residents, and in compliance with M.G.L. c.121B, §49(c), the BRA required the Developers (in the Land Disposition Agreement, which set the terms of the BRA's conveyance of the Lowell Square parcel to the Developers) "to give preference in the selection of Unit Lessees for dwelling units built on the Property to displaced families..." (Pet.App. 29a). In addition, the developer was mandated to comply with the requirements of federal funding for West End Place, and consistent with the provisions of M.G.L. c.121B, §49(d), the BRA made such preference "[s]ubject to the Affirmative Fair Housing and Marketing Plan...." Id.

In order to accommodate the interests of the former West End residents, the Developers included in their AFHMP a set-aside of 55% (101 of 183) of the units to be built exclusively for former West End residents. (Pet.App. 30a). Mechanically, two pools of qualified applicants were created--one comprised of former West End residents and one comprised of the balance of the city of Boston at large. (Pet.App. 32a-33a). The "set-aside" for the West Enders was the only one incorporated into the lottery process. In order to create this special preference for former West End residents, HUD's Assistant Secretary of Housing granted special waivers of HUD regulations, which otherwise would have required that all 183 units be made available to the general public. (Pet.App. 31a).

REASONS FOR DENYING THE WRIT

The BRA and its former Director, Marisa Lago (collectively hereinafter referred to as the "BRA"), oppose the Petitioners' Petition for Writ of Certiorari. Under the Rules of the Supreme Court, writ of *certiorari* is granted only for "compelling reasons," including such examples cited

in Rule 10 as (a) a United States circuit court of appeals' rendering of a decision in conflict with another circuit court or a state court of last resort, or its extreme departure from accepted and usual judicial proceedings; (b) a state court of last resort's rendering of a decision on an important federal question in conflict with another state court of last resort or a circuit court; and (c) a state court's or circuit court's decision on an "important question of federal law" that has not been (but should be) settled by this Court, or that conflicts with relevant decisions of this Court. See Supreme Court Rule 10. As more fully set forth below, none of these situations is presented in this case, and therefore there does not exist a "compelling reason" for this Court to grant a writ of certiorari.

Notwithstanding the Petitioner's assertion that the First Circuit's decision is on a "collision course" with this Court's controlling precedent," this case turns primarily and fundamentally on discrete issues of state law that are entirely independent of any purported federal question presented by the Petitioner. In particular, the Petitioners' case is entirely dependent on their allegation that, under Massachusetts law, that have an unqualified "statutory housing preference" under M.G.L. c.121B, §49(c) for the housing units which are the subject of this case. As both the Massachusetts District Court, and the First Circuit Court of Appeals have held, however, there is no such absolute "statutory housing preference" under Massachusetts state law. The Petitioners alternatively argue that the state statute, M.G.L. c.121B, §49(c), created a trust for their benefit. This state law claim has also been rejected by the courts below. In this context, this case presents no actual federal question, let alone one sufficiently important to engage this Court's attention. Granting *certiorari* in this case would involve this Court in deciding dispositive state law issues before it could address even address any purported federal issues.

Even if the Petitioners could overcome this obstacle,

certiorari would still not be appropriate in this case, which presents a complicated and rare, if not unique, intersection of federal, state, and local statutes and regulations, as well as a previously decided federal lawsuit involving different parties as it applies to the West End Urban Renewal Project, which is highly unlikely to occur again in the future. Any decision in this case would have little or no general application to other litigation.

Given the dispositive state law issues which form the crux of the Petitioners' claims, and further in light of the unique complexity of federal, state and local statutory and regulatory schemes at play in this action, this case most certainly does not present an "important question of federal law" warranting this Court's review.

I. THE PETITIONERS' CASE IS PREMISED FUNDAMENTALLY ON A PURPORTED ABSOLUTE HOUSING "PREFERENCE" THAT DOES NOT EXIST UNDER MASSACHUSETTS STATE LAW IN THE CONTEXT OF THIS CASE

The crux of the Petitioners' appeal to this Court, as reflected in their Question Presented For Review, is that the BRA and other government respondents "withd[rew]...a statutory housing preference" from them because they "are almost all white." This question as well as the Petitioners' entire Petition for Writ of Certiorari fails to acknowledge that the claimed "statutory housing preference" does not exist under Massachusetts state law in the context of this case. To the contrary, the federal government granted a waiver of the requirements of federal statutes and regulations pursuant to which grants and subsidies for the project were made. These requirements were incorporated into M.G.L. c.121B, §49(d) to grant a special preference to West Enders to 55% of the units, without regard to their race. Thus, as a matter of state law, the purported question presented by the

Petitioners is irrelevant to the ultimate determination of this case.

A. Under Massachusetts State Law, Petitioner's Purported "Statutory Housing Preference" Does Not Exist In This Case.

Under the language of the state statute and under the rulings by both federal courts below, the "preference" the Petitioners assert by reference to M.G.L. c.121B, §49 does not create an absolute right to the 183 units at West End Place. As a matter of state law, the explicit language of §49 mandates compliance with "requirements of federal legislation or regulations under which loans, grants, or contributions have been made...to meet part of the cost of the project." M.G.L. c.121B, §49(d).

The Petitioners, as well as the entire class of former West End residents, have had the opportunity to exercise their rights under M.G.L. c.121B, §49 with respect to over 2,200 new housing units that were constructed within the Urban Renewal Area over the past 40 years by Charles River Park. The Petitioners' contention that they lacked the means to purchase the market-rate Charles River Park units is immaterial and reflects their fundamental misconception of the rights afforded to urban renewal displacees under the statute.

The Massachusetts statute most assuredly does *not* create a "right of return" for displacees of urban renewal. Far from entitling them to affordable housing, §49(c) expressly limits any preferential treatment thereunder to individuals who are able and willing to pay market rate rents and prices for new housing units built in an urban renewal area. With respect to the very project at issue in this case, the Massachusetts Supreme Judicial Court has declared: "at no time has any such requirement [of low income housing] been a part of the West End Plan." DCA, *supra* at 879. Indeed,

there is no requirement that housing be built in the project area; the BRA could have designated it for retail, office, or public space, or even open space, as it in fact did with respect to many parcels. See Id. at 870-71; Charles River Park, Inc., *supra* at 23, fn. 4, 25. Moreover, any preferential treatment to which any specific individual is entitled under M.G.L. c.121B, §49 is subject to the general purposes of the project as constructed. The BRA, for instance, required Charles River Park to include low and moderate income housing for the elderly on one development parcel in the project area. (See, DCA, *supra* at 872, 878). Former West End residents who were not "elderly" could not have exercised any "preference" described in §49, and had no "right of return," with respect to those dwelling units.

Any "preference" to which Petitoners are entitled is no more or no less than that set forth in M.G.L. §49, subject to the terms provided therein and only to the extent such terms are applicable.[5] As a matter of state law, requirements of federal statutes and regulations applicable to funding for the project are explicitly incorporated by the Massachusetts Legislature into §49(d), and preclude the absolute "right of return" the Petitioners allege exists under §49(c).[6] As District Court explicitly held, the housing "preference" under §49(c) is "qualified by the requirements of federal law" under

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[5]As the BRA argued below (Pet.App. 39a), it is not clear that Petitioners even have standing or a private right of action to seek enforcement of their interpretation of M.G.L. c.121B, §49. This statute requires the BRA to obtain certain agreements from private redevelopers. It does not provide for suits of individuals against the BRA.

[6]As the Massachusetts District Court properly observed, "subsection (d) requires conformity with federal law, which in this case does not permit such an unqualified preference" as the Petitioner sought to assert under §49(c). Pet.App. 46a.

§49(d). (Pet.App. 50a).[7] In affirming the dismissal of the Petitioners' case, the First Circuit further noted that the Petitioner had "not challenged" the District Court's ruling that the federal law requirements under §49(d) "qualify the statutory priority" under §49(c). (Pet.App. 77a).

B. In Exercise of its Statutory Duty to Administer M.G.L. c.121B, §49, the BRA Interpreted and Implemented Subsections (c) and (d) Together, and in Doing So Preserved Preferential Treatment for Petitioners in Fulfillment of §49(c).

The BRA applied §49 in a manner that allowed (with the cooperation of HUD[8]) 55% of the units to be reserved exclusively for the former West End residents.[9] This

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[7] In this regard, the District Court also observed that one of the Petitioners (the Old West End Housing Corporation or "OWEHC") acknowledged that "federal law limited the preference that could be given to former West End residents" when it entered into a Participation Agreement with Respondent Lowell Square Associates. (Pet.App. 50a, fn. 18). In the Participation Agreement, OWEHC agreed that such preference was "subject...to applicable...federal laws." Id.

[8] In order to facilitate the BRA's creation of this special set-aside for former West end residents in the face of §49(d), HUD agreed to obtain limited waivers of the strict application of the federal regulatory requirements.

[9] Had the BRA interpreted §49(d) strictly in this case, no set aside or preference would have been created for any racial or ethic class. Rather, all of the 183 units at West End Place would have been offered through a lottery process open to members of the entire Boston community on an entirely race neutral basis. Under the BRA's administration of the statute, 45% of the units were made available to the Boston community at large, while the remaining 55% were reserved exclusively for the West End group of which the Petitioners were a part. Although the BRA's interpretation of the statute in this manner had the *de facto* effect of creating a set aside for a class of persons who are "almost

permitted the West Enders to be given preferential treatment pursuant to §49(c), while at the same time ensuring that, in accordance with §49(d), all of the requirements necessary to obtain the critical federal funding for the West End housing project were met.

Under Massachusetts law, the BRA is charged with the administration of the urban renewal statute, and has been given special statutory authority in this regard to safeguard the public interest in urban renewal projects throughout the city of Boston. DCA, *supra* at 875. In discussing the relevant state law principles at issue in this case, the District Court acknowledged that the BRA is "the agency charged with administration of the statute [M.G.L. c.121B §49]" and that "its reasonable interpretation of legislative intent deserves some deference from the court." (Pet.App. 46a); see Nuclear Metals, Inc. v. Low-Level Radioactive Waste Management Bd., 656 N.E.2d 563, 572 (Mass. 1995); Manning v. Boston Redevelopment Authority, 509 N.E.2d 1173, 1179 (Mass. 1987)("[w]e give substantial deference to the construction placed on a statute or ordinance by the agency charged with its administration.").

Confronted with a potential linguistic conflict between M.G.L. c.121B, §49(c) and (d), the BRA exercised its discretion by implementing the statute in a manner that gave effect to *both* provisions, consistent with the overall statutory scheme. In the first instance, compliance with the requirements of the federal funding regulations, in accordance with §49(d) was paramount. The BRA had to ensure that the conditions and requirements of federal funding required for West End Place housing development were met. Otherwise, these critical federal funds would not

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all white" (i.e., former West End residents, of whom the four Petitioners in this case are a part), it was consistent with the BRA's statutory duty and obligation under Massachusetts law to administer the statute in the public interest.

have been available and the mixed-income project would not have been built.[10] Obviously, had the BRA interpreted §49(c) as granting the Petitioners an absolute right to occupy all units to be constructed, as the Petitioners assert, neither the interests of the public at large *nor the Petitioners* would have benefitted--the housing units at issue would not have been built.

The Petitioners' assertion that the preference available to them was "reduced from 100% to 55%" is factually inaccurate. Rather, the cooperation of the Developers, the BRA and HUD made it possible to create *any* set-aside for former West End residents in the face of federal funding requirements which otherwise, under federal and state law, would have eliminated, as a practical matter, any special treatment for them under §49(c). Moreover, as set forth above, the Petitioners' assertion that the reference to a "preference" in §49(c) provides them with an absolute right to any housing unit built in the Urban Renewal Area is without foundation under Massachusetts law.[11]

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[10] As the District Court noted, if the BRA did not give meaningful effect to the federal regulatory requirements, "the federal government could not legally, and as a practical matter would not, contribute to the project..." (Pet.App. 48a-49a).

[11] Equally unavailing is the Petitioners' suggestion that §49(c) and (d) should have been reconciled by affirmatively marketing the units (in compliance with the AFHMP requirement) only to the former West End residents who were displaced back in the 1950s. As the former West Enders are, by their own admission, "almost all white," applying the AFHMP in this manner would have eviscerated fair housing policies behind the federal statutes and regulations, and would have effectively promoted segregated housing policies--all in contravention of HUD's statutory mandate. As the lower court appropriately observed, "[i]t would be a charade to affirmatively market the units at West End Place to attract minority applicants and then give former West End residents an absolute preference to all of those units because the vast majority of them are white." (Pet.App. 48a).

Although in dicta, the Massachusetts District Court suggested that the BRA's interpretation of the statute in this case is not subject to the degree of deference established by Chevron U.S.A., Inc. v. National Resource Defense Council, Inc., 467 U.S. 873, 843 (1984), it nonetheless held that the BRA's interpretation of §49 to give effect to *both* subsections (c) and (d), "constructed the statute in a manner consistent with its language, common sense, and the requirements of federal law." (Pet.App. 49a). In this respect, the District Court held that, regardless of the appropriate degree of deference, "the BRA's interpretation of §49...is not only reasonable, its is right." (Pet.App. 47a).[12]

C. The Petitioners' Assertion That M.G.L. c.121B, §49(c) Creates a Trust for the Benefit of Former West End Residents is Without Basis Under Massachusetts Law, and Presents a Further Issue of Discrete State Law For This Court to Address.

In its Petition, the Petitioners "preserve and press" their argument below that the state statute, M.G.L. c.121B, §49(c), created a trust for the benefit of all former West End residents, which came into being at the time the BRA took title by eminent domain to the Urban Renewal Area back in 1959. As the Massachusetts District Court correctly held in dismissing this claim (as affirmed by the First Circuit Court of Appeals), §49(c) does not create a trust.

Applying Massachusetts state law, the lower courts held

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[12]Indeed, recent developments in this case demonstrate that the BRA's interpretation of §49 produced excellent results. As the brief of the Developer respondents indicates, *all* of the qualified former West End residents were offered units at West End Place. Thus, not only did the BRA's interpretation of §49 facilitate the necessary federal funding for the creation of the mixed-income West End Place project, but also, in the end, allowed every single qualified former West End resident to enjoy preferential treatment under §49(c).

that critical elements of a trust, such as a specific intent to create a trust and the existence of a clearly identifiable trust *res* at the time of creation of a trust, are not met by §49(c).[13] (App 50a-51a). See New England Trust Co. v. Sanger, 149 N.E.2d 598 (Mass. 1958); Ventura v. Ventura, 555 N.E.2d 872 (Mass. 1990). This determination that §49(c) could not have created a trust by providing for a "preference" to "dwelling units built in the project area" accurately reflects urban renewal law in Massachusetts. At the time the BRA took title to the West End Urban Renewal Area back in 1959, there were no "dwelling units" which could have been held in trust. A number of events (some of them contingent) had to occur *subsequent* to the taking before such a *res* would come into existence. First, the BRA would have had to sell the land to a developer. Second, the land would have to be devoted to residential use, as opposed to various commercial uses, retail uses, government uses, recreations uses or other public uses. Third, even if the land were ultimately devoted to housing, the actual construction of the housing units (*the res)* devoted would have to be accomplished before §49(c) "preference" to such units would apply.

Under Massachusetts law, "there can be no trust unless there is an existing trust res...and that an interest which has not come into existence cannot be held in trust" New England Trust Co., 149 N.E.2d at 602.[14]

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[13]In order to create a trust under Massachusetts law, the following three elements must be present: (1) an intent to create a trust; (2) a clearly defined trust res; and (3) identifiable trust beneficiaries. Bane v. LeRoux, 157 B.R. 500, 509 (Bankr. D. Mass. 1993), citing Ventura v. Ventura, 555 N.E. 2d 872, 874 (Mass. 1990).

[14]At various points, the Petitioner has also suggested that §49(c), in granting a "preference" to urban renewal displacees, further grants an "implied" trust to the former West Enders. This theory also fails. Under Massachusetts law, "public grants must be strictly construed against the

Aside from being incorrect, the Petitioners' assertion that §49(c) creates a trust for the benefit of former West End residents is yet another discrete issue of state law that this court would have to address and resolve if *certiorari* were granted, independent of any purported federal questions the Petitioners have submitted for review. This, again, counsels against the grant of a writ of *certiorari* in this case.

II. THIS CASE DOES NOT PRESENT A LEGITIMATE FEDERAL QUESTION JUSTIFYING THE GRANT OF A WRIT OF CERTIORARI

The Petitioners' framing of the case to this Court as a clean constitutional question of whether their "statutory housing preference" was withdrawn from them because they "are almost all white" reflects their attempt to mask the lack of substantive merit to their claims.[15] Stitching together a number of isolated quotes from the Circuit Court's opinion where terms such as "race" "racial motive," "whites," "minorities" and "strict scrutiny" are used, the Petitioners assert that this case "is on a collision course with this Court's controlling precedent" in the area of affirmative action. Behind these emotionally charged terms, however, there is

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grantee," Charles River Park, Inc., 557 N.E.2d at 28, and "[n]othing will be included in the grant except what is granted expressly or by clear implication." Id. citing Prudential Ins. Co. of America v. Boston, 369 Mass. 542, 547, 340 N.E.2d 858 (1976).

[15] From the outset of this case, the Petitioners have obfuscated the flaws in their case by asserting vague theories without any clearly defined contours. At the commencement of this action, Petitioners filed what the Massachusetts District Court characterized as a "rather rambling complaint." (Pet.App. 35a). This Court should not attempt to unravel the tangled web of facts and imprecisely joined issues of federal and state law, which form the foundation of the federal question the Petitioners have purported to present.

simply no substance to the Petitioners' purported constitutional question.

As discussed *supra*, the state "statutory housing preference" which forms the crux of the Petitioners' Equal Protection claim is not what they assert it to be. As a matter of state law, any such preference is qualified by the requirements of federal funding for the project, which included several federal fair housing statutes and regulations, as well as the terms of a federal Consent Decree which imposed special conditions on HUD funding in the city of Boston specifically. Rather than confront this fundamental flaw in the premise of their constitutional question, the Petitioners simply ignore it. As the First Circuit noted, the Petitioners "have not challenged" the ruling that "such federal requirements--as a matter of Massachusetts law--qualify the statutory preference." (Pet.App. 77a). Moreover, the Petitioners do not even purport to challenge the validity of the federal fair housing statutes, HUD regulations, or the Consent Decree[16] which operate to qualify their asserted "preference" in this case.

There was no underlying issue of dispositive state law in Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S.Ct.

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[16] While the Petitioners purport only to challenge the Consent Decree "as applied", however, it appears from their arguments that they are attacking the validity of the Consent Decree itself. The Petitioners for instance argue that the decree is "structurally overbroad," that the district court should have modified it in this case, and that a purported "sunset clause" makes it inapplicable to this case. This back door attack on the Consent Decree is an attempt to circumvent their failure to properly challenge the decree in the NAACP case. Although the Petitioners attempted to intervene in that case, they abandoned that challenge to the Consent Decree when the District Court denied their motion to intervene. The Petitioners did not pursue their challenge by appealing the District Court's decision to the First Circuit. Having allowed its right of appeal in the NAACP case to lapse, the Petitioners, fifteen months later, filed the present action, involving different parties and a different set of facts to, in effect, resuscitate their challenge to the validity of the Consent Decree.

2097 (1995), Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 110 S.Ct. 2997 (1990); City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 109 S.Ct. 706 (1989) or any of the other cases through which this Court established the constitutional standards for racial preferences, which the Petitioners contend govern the present case. Indeed, this case does not involve a racial preference in the mode of Adarand, Croson and Metro Broadcasting, all of which involved the government distributing benefits in a manner that favored one race to the detriment of others. The AFHMP is simply a marketing tool designed to increase minority participation in the applicant pool, and does not involve a quota, set aside, preference or any other mechanism designed to favor minorities in the actual distribution of the government benefit involved (i.e. the selection of recipients of units). As the First Circuit put it aptly, in reference to the Petitioners' loose use of constitutional terms, "[d]espite the use of the 'racial classification' label, the complaint alleges no facts that would bring that label into play." (Pet.App. 73a).

When one looks behind the veneer of the constitutional language the Petitioner has sprinkled throughout their Petition, it becomes apparent that there is no cognizable federal question meriting review by this Court.

The First Circuit's decision herein is not in conflict with this Court's precedent in the area of racial preferences, under Adarand, Croson and other related cases. The holdings on the legal issues (especially the dispositive state law issues) in this case do not conflict with holdings of other circuits,[17] and the First Circuit certainly did not extremely depart from

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[17]The Petitioners' assertion that the First Circuits decision in this case is in conflict with Lutheran Church v. FCC, 1998 WL 168712 (D.C. Cir. 1998) is similarly without substance. Aside from the fact that the entirely race-neutral lottery process employed in this case for the selection of tenant at West End Place distinguishes this case from Lutheran Church, the District of Columbia Circuit in that case in fact specifically distinguished Raso and in fact approved the court's reasoning. Id. at n.8.

accepted judicial proceedings. Moreover, this case does not involve a decision of a state Court that conflicts with law in other jurisdictions. There are no "compelling reasons" that would warrant this Court's granting a writ of *certiorari*.

III. EVEN IF THE PETITIONER HAD PRESENTED A COLORABLE FEDERAL CLAIM, THE COMPLEXITIES INVOLVED IN THIS CASE ARE UNIQUE AND ARE UNLIKELY TO REOCCUR IN THE FUTURE

Even aside from the adequate and dispositive state law issues discussed above, this case involves a complex intersection of laws and polices on federal, state, and local levels which are unique to the case and are unlikely ever to occur again in the future. The resolution of these complexities by this Court would produce little precedential value for future cases, and would not materially further the development of principles this Court has established in its prior cases on affirmative action.

As the First Circuit Court of Appeals observed, "we are dealing here with an ad hoc administrative action...prompted not by any general, racially skewed policy toward statutory preferences but by the peculiar interplay of Boston's consent decree, the Massachusetts statute, and the respective racial makeups of the Boston population and the former West Enders."

As the First Circuit indicates, the government bodies involved in this case were confronted with the challenge of integrating the final phases of two separate and complex processes--the evolution of the federal fair housing laws as they apply to the city of Boston and the completion of of an urban renewal project which commenced four decades ago.

In adapting to the evolving circumstances and needs of the community, the government agencies had to address an intersection of federal fair housing statutes and related HUD

regulations, the incorporation of affirmative fair housing governmental policies, the requirements of a state statute (M.G.L. c.121B, §49), and the impact of a federal consent decree rendered in another federal lawsuit that has application to HUD funding of housing in the city of Boston. Indeed, the origins of this case, and of the Petitioners' interests, have to do with an urban renewal plan carried out in the city of Boston over forty years ago, pursuant to a section of the National Housing Act of 1949 which has since been repealed. See 42 U.S.C. §1441 et seq.

The complex circumstances of this case are surely rare, if not unique, and the intersection of so many federal, state and local interests and policies is unlikely to reoccur. Owing to its complicated factual background and uncommon legal issues, this case is not an appropriate one for further consideration by this Court.

CONCLUSION

For the reasons set forth above, the BRA respectfully requests that this Court deny the Petition for Certiorari in this case.

Respectfully submitted,

MARISA LAGO and the
BOSTON REDEVELOPMENT
AUTHORITY,
By their attorneys,

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Dated: June 26, 1998

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42 U.S.C. §2000d

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. §3601

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

42 U.S.C. §3604

Discrimination in the sale or rental of housing and Other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful ---

(a) To refuse to sell or rent after the making of bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial, status, or national origin.

(b) To discriminate against any person in the term, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination base on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representation regarding the entry or prospective entry into the neighborhood of a person or person of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f) (1) to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(c) any person associated with that buyer or renter.

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services for facilities in connection with such dwelling, because of a handicap of --

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

(3) For purposes of this subsection, discrimination includes --

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(B) a refusal to make reasonable accommodations in rule, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that--

(i) the public use and common use portions of such dwelling are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into through the dwelling;
(II) light switches, electrical outlets, thermostats, and other environmental control in accessible locations;
(III) reinforcements in bathroom walls to allow later installation of grab bars; and
(IV) usable kitchens and bathrooms such that an individuals in a wheelchair can maneuver about the space.

(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1" suffices to satisfy the requirements of paragraph (3)(C)(iii).

(5)(A) If a State or unit of general local government has incorporated into its law the requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

(B)A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

(C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwelling, determinations as to whether the design and construction of such dwellings are consistent with graph (3)(C), and shall provide

technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).

(D) Nothing in this subchapter shall be construed to require the Secretary to review or approve the plans, designs or constructions of all covered multifamily dwellings, to determine whether the design and construction of such dwelling are consistent with the requirements of paragraph 3(C).

(6)(A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 3610(f)(3) of this title to receive and process complaints of otherwise engage in enforcement activities under this subchapter.

(B) Determinations by a State or a unit of general local government under paragraph (5)(A) and (B) shall not be conclusive in enforcement proceedings under this subchapter.

(7) As used in this subsections, the term "covered multifamily dwellings" means--

(A) building consisting of 4 or more units if such building have one or more elevators; and

(B) ground floors units in other building consisting of 4 or more units.

(8) Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this subchapter shall be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons

greater access than is required by this subchapter.
(9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of otherindividuals or whose tenancy would result in substantial physical damages to the property and others.

42 U.S.C. §3608(e)(5)

(e) Functions of Secretary

(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter; and

24 C.F.R. §200.610

It is the policy of the Department to administer its FHA housing programs affirmatively, as to achieve a condition in which individuals of similar income levels in the same housing market area have a like range of housing choices available to them regardless of their race, color, religion, sex, handicap, familial status or national origin. Each applicant for participation in FHA subsidized and unsubsidized housing programs shall pursue affirmative fair housing marketing policies in soliciting buyers and tenants, in determining their eligibility, and in concluding sales and rental transactions.

24 C.F.R. §200.620

With respect to all FHA subsidized or unsubsidized programs in which the applicant hereafter participates (except for housing for which a conditional commitment has been issued prior to the effective date of these regulations), the applicant shall meet the following requirements or, if he contracts marketing responsibility to another party, be

responsible for that party's carrying out the requirements:

(a) Carry out an affirmative program to attract buyers or tenants, regardless of sex, handicap or familial status, of all minority and majority groups to the housing for initial sale or rental. An affirmative marketing program shall be in effect for each multifamily project throughout the life of the mortgage. Such a program shall typically involve publicizing to minority persons the availability of housing opportunities regardless of race, color, religion, sex, handicap or familial status or national origin, through the type of media customarily utilized by the applicant, including minority publications or other minority outlets which are available in the housing market area. All advertising shall include shall include either the Department-approved Equal Housing Opportunity logo or slogan or statement and all advertising depicting persons shall depict persons of majority and minority groups, including both sexes.

(b) Maintain a nondiscriminatory hiring policy in recruiting from both minority and majority groups, including both sexes and the handicapped, for staff engaged in the sale or rental of properties.

(c) Instruct all employees and agents in writing and orally in the policy of nondiscrimination and fair housing.

(d) Specifically solicit eligible buyers or tenants reported to the applicant by the Area or Insuring Office.

(e) Prominently display in all offices in which sale or rental activity pertaining to the project or subdivision takes place the Department-approved Fair Housing Poster and include in any printed material used in connection with sales or rentals, the Department-approved Equal Housing Opportunity logo or slogan or statement.

(f) Post in a conspicuous position on all FHA project sites a sign displaying prominently either the Department-approved Equal Housing Opportunity logo or slogan or statement.

24 C.F.R. §850.151(g)

(g) *Affirmative fair housing marketing.* Marketing must be done in accordance with the HUD-approved Affirmative Fair Housing Marketing Plan. Form HUD-935.2. and all fair housing and equal opportunity requirements. The purpose of the Plan and the requirements is to provide for affirmative marketing through the provision of information regarding the availability of units in projects assisted. Affirmative marketing steps consist of good faith efforts to provide information and otherwise attract eligible persons from all racial, ethnic and gender groups in the housing market area to the available housing.

Supreme Court, U.S.
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NO. 97-1748.

IN THE

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OCTOBER TERM, 1997

ALFRED RASO, ET AL.,

Petitioners,

v.

MARISA LAGO, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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June 26, 1998

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

35 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the First Circuit correctly decided that no constitutional violation occurred when the government conditioned the use of federal funds for an apartment building on the requirement that "some of the apartments — which otherwise would have almost automatically been occupied by whites — be made available to all applicants on a race-blind basis."

LIST OF PARTIES

PETITIONERS: ALFRED J. RASO
JOAN BELINSKI CALABRO
FRANK LEVINE
THEODORE RICHARD NEDD
on behalf of themselves and all other displaced persons from the West End.

RESPONDENTS: MARISA LAGO
THE BOSTON REDEVELOPMENT AUTHORITY
HENRY CISNEROS
THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
THOMAS A. MENINO
THE CITY OF BOSTON
VICTORIA L. WILLIAMS
THE BOSTON FAIR HOUSING COMMISSION
SANDRA HENRIQUEZ
THE BOSTON HOUSING AUTHORITY
ROBERT H. KUEHN
KEEN DEVELOPMENT CORPORATION
LOWELL SQUARE NOMINEE TRUST
THE REVEREND MICHAEL F. GRODEN
PLANNING OFFICE FOR URBAN AFFAIRS INC.
LOWELL SQUARE ASSOCIATES, JOINT VENTURE
LOWELL SQUARE COOPERATIVE LIMITED PARTNERSHIP
MALONEY PROPERTIES, INC.
MARK MALONEY

RESPONDENTS' CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the following disclosure is made regarding parent companies and non-wholly owned subsidiaries of the Developer Respondents:

Planning Office for Urban Affairs Inc. is a non-profit corporation of which Bernard Francis Cardinal Law, Roman Catholic Archbishop of Boston, a Corporation Sole, is the sole member.

Keen Development Corporation has no parent company. The following is a list of its non-wholly owned subsidiaries: Academy Hill Associates, L.P.; Chelsea Campus Associates, L.L.C.; Craigie Arms Associates, L.P.; Crimson Associates, L.P.; Fig Factory Associates, L.P.; Jamaica Plain Associates, L.P.; Kennedy Lofts Associates, L.P.; Lincoln House Associates, L.P.; Lower Mills Associates, L.P.; Lower Mills Associates II, L.P.; Peerless/Keen Partners; Smith/Keen Partners; Warren House Associates; Warren House Associates, L.P.

No other corporation which is a Respondent in this case has either a parent company or non-wholly owned subsidiary which is not also a party.

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No. 97-1748.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ALFRED RASO, et al.,

Petitioners,

v.

MARISA LAGO, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW

In a Memorandum and Order dated January 6, 1997, the United States District Court for the District of Massachusetts, dismissed petitioners' claims prior to any application for class certification. Petition Appendix ("Pet. App.") at 22a.

In an Opinion dated January 27, 1998, the First Circuit Court of Appeals affirmed the decision of the District Court.

Pet App. at 63a. The Court of Appeals held that HUD's decision to limit the preference for former West Enders in order to insure that not all of the apartments being subsidized would automatically be occupied by only white residents did not constitute a "racial classification" triggering strict scrutiny. The Court of Appeals further held that the Complaint alleged no facts suggesting that HUD's decision was motivated by any purpose other than a legitimate interest in compliance with HUD's obligations to promote integrated housing through its funding programs. Finally, the Court of Appeals rejected petitioners' claim under state law that the statutory preference created a "trust" for the benefit of the former West Enders.

STATEMENT OF THE CASE

Nearly thirty years following adoption of an urban renewal plan for the area, the Boston Redevelopment Authority ("BRA") awarded the entities referred to by the Court of Appeals as the "[D]eveloper" defendants the right to develop the West End Place Project in Boston's West End. One of the conditions imposed by the BRA in the designation was that "[p]urchase (and/or rental) preference shall be afforded to former West Enders (*subject only to applicable local, state, and federal laws, including but not limited to fair housing laws*)." (Emphasis added.) This requirement mirrored the qualified preference accorded to persons displaced by urban renewal under the state urban renewal statute. Court of Appeals Appendix ("Ct. App. App.") at A214.

The West End Place Project was developed using substantial federal funding. *Id.* at A129-30, A145-47. For example, it includes low income units subsidized by funds from

HUD's Section 8 program. *Id.* at A129-130. The public funds were conditioned on the Developer's compliance with applicable fair housing laws. *Id.*

In an earlier, separate action, the NAACP brought suit against the Department of Housing and Urban Development ("HUD"). *NAACP* v. *Kemp*, 721 F. Supp. 361 (D. Mass. 1989). Following a trial and a finding of liability against HUD for violation of the Fair Housing Act for failing to condition use of federal funds on advancement of fair housing objectives, the action was eventually resolved by a consent decree. *Kemp*, 721 F. Supp. at 365. In the consent decree, HUD agreed to ensure, among other things, that affirmative fair housing marketing plans would be designed by owners of HUD-assisted projects in Boston and would have as their goal and measure of success the achievement in HUD-assisted housing located in neighborhoods which are predominantly white of a racial composition which reflects the racial composition of the City as a whole. The Decree provided that "[n]othing herein shall constitute or be construed as requiring a quota." *Id.* at A78-88.

In December 1994, the city, the former West Enders, HUD, NAACP and the BRA engaged in a mediation under the auspices of the City of Boston in an attempt to balance the former West Enders' asserted preference for units at West End Place, the commitments made by the Developer in obtaining designation as the Developer of the project and the competing federal and state laws and policies. *Id.* at A24. The mediator was a former United States Attorney. *Id.* He recommended that the former West Enders be given a preference of 55% of the units at West End Place. *Id.* at A144. The Developer, HUD and the BRA agreed to abide by the mediator's recommendation. The former West Enders refused. *Id.* at A134, A144.

The Developer marketed the Project according to an Affirmative Fair Housing Marketing Plan ("Marketing Plan") required by federal law. *Id.* at A121-27, A132. Under the Marketing Plan, the availability of housing at the development was affirmatively marketed to the public, including the former West Enders and minority communities. *Id.* at A134-35, A224-66. The Marketing Plan is required by the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, federal regulations including those at 24 C.F.R. § 200.600 *et seq.*, and the *Kemp* Consent Decree. App. at A83, A129.

The tenant selection procedure employed by the Developer was entirely race neutral. *Id.* at A134-39, A241-48. The marketing agent randomly assigned lottery numbers to all applicants without reference to race. *Id.* at A137-38, A151, 52. After the lottery, the applications were divided into two groups: one comprised of former West Enders and the other comprised of all other applicants. *Id.* at A137. The marketing agent then categorized applicants based solely on income level and, for low and moderate income units, family size. *Id.* at A138. The applicants with the lowest lottery numbers were invited to complete formal applications and were screened and matched with available units. *Id.* at A138. The former West End applicants were given preference to 55% of the units in the tenant selection process. *Id.* at A134. While the Developer marketed the Project pursuant to the Marketing Plan, the tenant selection process did not take into account the race of the applicant. *Id.* at A137-139.

Despite the Developer's commitment to give the former West Enders preference to 55% of the units, including low-income, moderate income and market units, the former West Enders continued to demand an absolute preference to every unit in the development. *Id.* at A31. In support of that position, Petitioners filed the instant action asserting that HUD's

refusal to agree to a one-hundred percent preference for former West Enders violated various federal constitutional and statutory provisions, as well as Massachusetts statutes and common law. In anticipation that there would be more interested former West Enders than available apartments under the fifty-five percent compromise, the Complaint sought, *inter alia*, injunctive relief setting aside all the apartments at West End Place for former West Enders.

In the end there was no such shortfall. At the conclusion of the tenant selection process, all the qualified former West Enders who desired an apartment received an apartment. *See* Appendix at 1a.

REASONS FOR DENYING THE WRIT

A. PETITIONERS' CLAIMS ARE MOOT AS NONE OF THE NAMED PLAINTIFFS IS SEEKING AN APARTMENT AT WEST END PLACE.

As described in the Affidavit of Mark Maloney, *see* Appendix at 1a, the claims of the petitioners are moot because none has a live controversy with respondents. In particular, none of the named plaintiffs is seeking an apartment at West End Place. Of the four named plaintiffs, one never applied for an apartment; one has requested that his application be withdrawn; and two have been removed from the waiting list for failure to respond to inquiries regarding their continued interest. *Id.* at ¶ 6. The latter two plaintiffs were removed pursuant to neutral rules of administration which have led to the removal of numerous applicants from both groups and which have not been challenged in this action. *Id.* at ¶ 5.

The Maloney Affidavit establishes that "a case or controversy no longer exists between the named plaintiffs" and respondents. *Board of School Commissioners of City of Indianapolis* v. *Jacobs*, 420 U.S. 128, 129 (1975). Because no class has ever been certified, the claims are moot. *See Jacobs*, 420 U.S. at 130. As a result, it would be improvident for the Court to consider a grant of *certiorari*.

It is settled law that where the named plaintiffs "no longer have any stake in [the] outcome," the action is moot. *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 430 (1976). *Accord O'Shea* v. *Littleton*, 414 U.S. 488 (1974) (none of named plaintiffs suffered any injury from challenged practices). *Accord* Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1785.1 ("if a class action is not properly certified prior to judgment being entered and the representative's claim becomes moot on appeal, then the action may be dismissed as moot").

B. EVEN THE CLAIMS OF ALL PUTATIVE CLASS MEMBERS ARE MOOT AS ALL QUALIFIED WEST ENDERS SEEKING APARTMENTS HAVE OBTAINED AN APARTMENT.

The Maloney Affidavit demonstrates not only that the claims of the named plaintiffs are moot, but that the same conclusion is dictated regarding the claims of all members of the putative class. In particular, "all of the qualified applicants in the lottery process who identified themselves as former residents of the West End have been offered apartments at West End Place." *See* Maloney Affidavit at ¶ 3, Appendix at 2a. In other words, the expected shortfall between the number of interested West Enders and the number of available apartments simply did not materialize.

Where petitioners have not "suffered some actual injury that can be redressed by a favorable judicial decision," no case or controversy exists. *Iron Arrow Honor Society* v. *Heckler*, 464 U.S. 67, 70 (1983). That is precisely the circumstance here because no ruling the Court could issue on the matter of petitioners' asserted "preference" would alter the number of West Enders occupying apartments. As a result, the Court lacks jurisdiction to decide the case. *Id.*[1]

Petitioners' claim for damages is equally moot. None of the former West Enders has been deprived of any compensable benefit. *See O'Shea, supra*, 414 U.S. at 494. In the end, all the qualified, interested former West Enders who participated in the lottery process obtained apartments at the same time as did the non-West End applicants. *See* Maloney Affidavit at ¶ 3, Appendix at 2a.

In addition to demonstrating the absence of a live controversy, the facts described in the Maloney Affidavit counsel against a grant of *certiorari* because they indicate that the claimed controversy is not a real dispute on any level. Because the West Enders who qualified for apartments have received them, there simply are no aggrieved parties. The Court has consistently held that it does not exercise its *certiorari* function in order to "satisfy a scholarly interest" in an issue. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). The Court in *Rice* emphasized that this rule has particular force in the context of constitutional issues

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[1] Although it is unclear from the Petition whether the Old West End Housing Corporation ("OWEHC") is among the Petitioners seeking review in this Court, *see e.g.* Petition at 1, in the event the Court were to construe the Petition to encompass the claims of OWEHC, the same analysis would dictate the conclusion that the claims of the organization are likewise moot. *See Warth* v. *Seldin*, 422 U.S. 490, 510-17 (1975) (no organizational standing in absence of standing of members).

where the Court ordinarily has the "duty to avoid decision of constitutional issues." *Id.*

C. Petitioners Lack Standing to Assert the Claims Presented.

The fact that none of the named plaintiffs ended up pursuing an apartment at West End Place dictates another conclusion which counsels against granting a writ of *certiorari*: none of the petitioners even has standing to assert the claims in the Complaint. Simply stated, the petitioners have not manifested a desire to live at West End Place. As a result, they cannot establish an injury which is "actual or imminent, not conjectural or hypothetical." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Absent such a "real and immediate threat," *Los Angeles* v. *Lyons*, 461 U.S. 95, 105 (1983), petitioners cannot satisfy the Article III requirement of standing. As the Court held in *O'Shea* v. *Littleton, supra*, 414 U.S. at 494,

> if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class. [footnote omitted]

The failure of petitioners to meet this "threshold requirement," *O'Shea*, 414 U.S. at 493, constitutes an independent, and equally compelling, ground for denying the petition. *See Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 117 S.Ct. 1055, 1067 (1997) ("[t]he standing Article III requires

must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance").

D. THE COURT OF APPEALS PROPERLY REJECTED PETITIONERS' EQUAL PROTECTION CLAIM.

The Court of Appeals properly concluded that this is not a case about a race-conscious selection plan. *Compare Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1988); *Wygant* v. *Board of Education*, 476 U.S. 267 (1986). In fact, it is not even a case about the use of race as a factor in selection of tenants. *Compare Regents of Univ. of California* v. *Bakke*, 438 U.S. 265 (1978). To the contrary, as the undisputed facts reflect, tenant selection at West End Place was conducted through the quintessentially race-neutral method of a *lottery*.

The only reference to race was in the adoption of an Affirmative Fair Housing Marketing Plan which, as required by federal regulations, established a goal of an integrated housing development.[2] The Circuit described the application of that requirement as follows:

> Here, the government's condition on federal funds was that some of the apartments —

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[2] As discussed *infra* at Section E, the Plan was further required in this instance by the Consent Decree in *NAACP* v. *Kemp*. Contrary to the contention of petitioners in their "Question Presented for Review," Petition at I, there has been no "misapplication" of the Consent Decree. In any event, petitioners' assertion in this regard would require an intensively fact-bound inquiry.

> which otherwise would have almost automatically been occupied by whites — be made available to all applicants on a race-blind basis. Pet. App. at 74a

Such a condition, the Court of Appeals held, no more violated the Equal Protection clause than does "[e]very anti-discrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute . . . ." *Id.* at 73a. In fact, HUD's requirement that some of the apartments be open to all applicants is even further from a "racial classification" because its objective was integration and not merely nondiscrimination. In other words, the Government's interest was not in the race of any particular applicant, but in preserving the possibility of attracting an integrated population overall at West End Place. *See Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422).

E. The Decision of the Court of Appeals is Consistent with Settled Law.

The conclusion of the First Circuit is consistent with the other Circuits which have examined the issue. *See e.g. Duffy* v. *Wolle*, 123 F.3d 1026, 1038-39 (8th Cir. 1997), *cert. den.* 118 S.Ct. 1839 (1998) (affirmative outreach does "not constitute discrimination"); *Ensley Branch, N.A.A.C.P.* v. *Seibels*, 31 F.3d 1548, 1571 (11th Cir. 1994) (outreach and recruitment are "race-neutral"). *Accord Alschuler* v. *HUD*, 515 F. Supp. 1212, 1234 (N.D. Ill. 1981), *aff'd.*, 686 F.2d 472 (7th Cir. 1982) ("purpose of the Affirmative Fair Hous-

ing Marketing Plan is not to guarantee racial quotas or racially integrated projects . . . [but] to ensure that all racial groups in a marketing area have knowledge of and an opportunity to rent units in a particular building"), *aff'd.*, 686 F.2d 472 (7th Cir. 1982).

Petitioners' effort to suggest a conflict among the circuits is squarely refuted by the very case upon which they primarily rely for this dubious proposition. Contrary to the suggestion of the Petition, at 9, the court in *Lutheran Church* v. *FCC*, 141 F.3d 344 (D.C. Cir. 1998) specifically distinguished — and in fact approvingly described — the decision in *Raso*. *Id.* at n.8. The *Lutheran Church* opinion noted that constitutional principles of equal protection were not offended by the application of the requirement of federal law that "federally funded housing be available to all applicants regardless of race" to overcome a state law "housing preference." *Id.* [3]

At bottom, the Petition seeks to challenge settled principles concerning the supremacy of federal law. The context for that challenge is the interplay between the federal Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (including the duty imposed on HUD by Section 3608 to affirmatively further fair housing in the use of federal funds) on the one hand, and a state statutory preference for "families displaced" by urban

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[3] Unlike *Lutheran Church*, in the selection of West End Place tenants there was not even an opportunity to tilt selections toward members of a particular race because all selections were made by lottery.

renewal activity nearly forty years ago.[4] *See* M.G.L. c. 121B, § 49.

The issue raised has long been resolved by reference to the Supremacy Clause. *See e.g. Katzenbach* v. *Morgan*, 384 U.S. 641, 647 (1966) (race-neutral voting rule "cannot be enforced to the extent it is inconsistent with" the federal Voting Rights Act). In fact, the Fair Housing Act includes a specific statutory provision rendering invalid any state law that "purports to require or permit any action that would be a discriminatory housing practice under" the Act. 42 U.S.C. § 3615.[5]

The challenge is even less worthy of the Court's attention as the very state statute upon which petitioners rely explicitly conditions the "preference" on compliance with federal law. *See* M.G.L. c. 121B, § 49. As a result, petitioners never had an "absolute" preference of the sort they now claim to any units at West End Place. In addition, the "preference" claimed by petitioners conflicts with the terms of a federal

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[4] It is far from clear that almost forty years after enactment of M.G.L. c. 121B, § 49, the former West Enders are entitled to any preference. They are entitled to the preference only upon demonstration that they are "displaced" persons. Nearly four decades after displacement, the former West Enders are not as a legal matter "displaced" within the meaning of the state law, M.G.L. c. 121B, § 49.

[5] The same result is dictated to the extent the issue is framed as a conflict between the HUD regulations requiring adoption of a Fair Housing Marketing Plan, *see e.g.*, 24 C.F.R. § 850.151(g), and the state statute. *City of New York* v. *FCC*, 486 U.S. 57 (1988) ("statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof").

court consent decree entered in the case of *N.A.A.C.P.* v. *Kemp*, 721 F.Supp. 361 (D. Mass. 1989).[6]

Finally, the instant matter arises from unique circumstances. The issue is not of any broader significance because it relates to an *ad hoc* administrative decision arising, as the Court of Appeals noted, from "the peculiar interplay of Boston's consent decree, the Massachusetts statute, and the respective racial composition of the Boston population and the former West Enders." Pet. App. at 75a-76a.

F. The Rule Urged by Petitioners Would Preclude Federal Agency Enforcement Actions.

As Judge Boudin noted in the decision below, to adopt petitioners' position would be to prohibit "[e]very antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute" because they "reflect a concern with race." Pet. App. at 73a. Such a contention stands in clear conflict with the settled law concerning the obligation of HUD to affirmatively promote integrated housing in the course of expending federal funds. As the court held in *Otero* v. *New York City Hous. Auth.*, 484

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[6] The court in *Kemp* found that HUD had failed to comply with its statutory obligation to promote fair housing through its housing funding programs. Subsequently the parties executed, and the court approved, a Consent Decree designed to remedy the prior violations of the Fair Housing Act. Among other provisions, it required the adoption of Affirmative Fair Housing Marketing Plans designed to promote racially integrated housing in neighborhoods of Boston which are predominately white. Contrary to the suggestion of the Petition, at 5-6, 26, the Decree remains in full force and has not been the subject of any "sunset clause." *See* Order of June 21, 1996.

F.2d 1122, 1134 (2d Cir. 1973), Section 3608(d)(5) of the Fair Housing Act

> requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built. Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation . . . .

This Court has also recognized that the goal of the Fair Housing Act is to "replace the ghettos 'by truly integrated and balanced living patterns.'" *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422).

On petitioners' view, HUD would be barred from considering the impact on segregative housing patterns of proposed uses of federal funds. Such a result would mean, for example, that HUD would not be able to decline to fund a project because of a concern about promotion of segregation.

Likewise, HUD would be barred from requiring that an applicant submit an Affirmative Fair Housing Marketing Plan. These Plans represent an important tool by which prospective residents of all races learn of federally-subsidized housing opportunities. A rule precluding the use of such racially neutral outreach efforts would squarely conflict with the fundamental purposes of the Fair Housing Act.

CONCLUSION

The Petition should be denied because the claims of petitioners for injunctive and monetary relief have been rendered moot as a result of the fact that the four named plaintiffs — as well as the remaining members of the putative class — have all received apartments or declined to pursue housing at West End Place. In short, the expected shortfall between the number of interested, qualified former West Ender applicants and the number of available apartments, has simply not materialized. The consequent absence of a live "case or controversy" powerfully counsels against the exercise of the Court's *certiorari* power.

Further, consistent with settled law, the Court of Appeals correctly rejected petitioners' request that — in addition to the fifty five percent (55%) of apartments already set aside solely for the all-white group of former West Enders — the remaining apartments should be kept from the general public where applicants of all races would have a fair chance to obtain one through the lottery. Such an outcome would have rendered futile any effort to promote integration of the development, thereby violating the Fair Housing Act and what this Court has recognized as the "strong national commitment to promote integrated housing." *Linmark Assoc's Inc.* v. *Township of Willingboro*, 431 U.S. 85, 94-95 (1977) (citing *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972)). Petitioners' contention that this national policy (and the specific statutory requirement that HUD affirmatively further fair housing in its expenditure of federal funds)

should give way to an explicitly conditional state law "preference" lacks support in law and logic.

Respectfully submitted,

ROBERT H. KUEHN, JR., KEEN DEVELOPMENT CORPORATION, MICHAEL F. GRODEN, PLANNING OFFICE FOR URBAN AFFAIRS, INC., LOWELL SQUARE ASSOCIATES JOINT VENTURE, LOWELL SQUARE COOPERATIVE LIMITED PARTNERSHIP, LOWELL SQUARE NOMINEE TRUST, MALONEY PROPERTIES, INC. AND MARK MALONEY,

By their attorneys,

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Exhibit D
Letter of September 17, 1997 to Richard Nedd ... 9a

APPENDIX A.

SUPREME COURT OF THE UNITED STATES

DOCKET NO. 97-1748

ALFRED J. RASO, et al.,	)
Petitioners,	)
v.	)
MARISA LAGO, et al.,	)
Respondents	)

AFFIDAVIT OF MARK MALONEY

I, Mark Maloney, hereby depose and state:

1. I am President of Maloney Properties, Inc. ("Maloney Properties"). Maloney Properties is a professional real estate management company and has been engaged by the developers of West End Place to handle the marketing and management of West End Place.

2. As President of Maloney Properties, I have knowledge of the selection process for applicants for apartments at West End Place.

3. As of February 4, 1998 all of the qualified applicants in the lottery process who identified themselves as former residents of the West End had been offered apartments at West End Place. Each of these applicants was offered apartments in the same time period that apartments were offered to applicants who were not former residents of the West End.

4. Attached hereto are the following documents reflecting the status of the applications of the four named plaintiffs in the instant action:

Exhibit A	A summary chart reflecting status of each named plaintiff
Exhibit B	Letter of June 2, 1997 to Alfred Raso
Exhibit C	Letter of July 21, 1997 to Frank Lavine
Exhibit D	Letter of September 17, 1997 to Richard Nedd

5. In the course of the selection process approximately eight hundred six (806) applicants were removed for failure to respond and approximately two hundred forty-five (245) applicants were removed at their request. Both categories included both former West End residents and other applicants.

6. As described in Exhibit A, of the four named plaintiffs, one never applied at all; one requested to be removed from

the waiting list; and two were removed for failing to respond to efforts to reach them by mail and telephone.

Signed under the pains and penalties of perjury this 18th day of June, 1998.

/s/

Mark Maloney

EXHIBIT A.

Name	Status
Mr. Frank Lavine	Removed 7/21/97 due to no response from attempts to reach him by mail or telephone.
Mr. T. Richard Nedd	Removed 9/17/97 due to no response from attempts to reach him by mail or telephone.
Mr. Alfred J. Raso	Removed 6/2/97 per Mr. Raso's request to be removed.
Ms. Joan Belinski Calabro	Never applied.

EXHIBIT B.

150 Staniford Street
Boston, MA 02114

Phone (617) 720-4646
Fax (617) 725-1888

WEST

END

PLACE

June 2, 1997

Mr. Alfred J. Raso
1374 Broadway 6D
Somerville, MA 02144

Certified # Z 389 745 499

Dear Mr. Raso:

This letter is to confirm our recent conversation requesting that your name be removed from the West End Wait List.

If you have any further questions, please do not hesitate to contact us at 720-4646.

Thank you for your interest in West End Place.

Very truly yours,

/s/

Cindy McGourty
Occupancy Manager

cos.soc

MARKETED AND MANAGED BY MALONEY PROPERTIES, INC.
EQUAL HOUSING OPPORTUNITY / EQUAL OPPORTUNITY EMPLOYER
FOR DISABILITY ACCESS INFORMATION CALL 617-449-7887 EXT 255
TDD #1-800-439-2370

EXHIBIT C.

150 Staniford Street
Boston, MA 02114

Phone (617) 720-4646
Fax (617) 725-1888

WEST

END

PLACE

July 21, 1997

Mr. Frank Lavine
20 Hillside Avenue
Medford, MA 02155

Dear Mr. Lavine:

This letter is to inform you that because we have no heard from you regarding your selection of an apartment, we are assuming that you are no longer interested in a unit at West End Place. We have, therefore, removed your name from our waiting list.

If you have any questions, please do not hesitate to call me. Thank you for your interest in West End Place.

Sincerely,

/s/

Mark Driscoll
Rental Agent

Certified Return Receipt #: Z256 770 938

MARKETED AND MANAGED BY MALONEY PROPERTIES, INC.
EQUAL HOUSING OPPORTUNITY / EQUAL OPPORTUNITY EMPLOYER
FOR DISABILITY ACCESS INFORMATION CALL 617-449-7887 EXT 255
TDD #1-800-439-2370

EXHIBIT D.

150 Staniford Street
Boston, MA 02114

Phone (617) 720-4646
Fax (617) 725-1888

WEST

END

PLACE

September 17, 1997

Mr. T. Richard Nedd
108 Porter Street
Malden, MA 02148

Dear Mr. Nedd:

We have been trying unsuccessfully to contact you via telephone, therefore, your name has been removed from the waiting list at West End Place.

If you have any further questions, please do not hesitate to contact us at 720-4646.

Thank you for your interest in West End Place.

Very truly yours,

/s/

Cindy McGourty
Occupancy Manager

MARKETED AND MANAGED BY MALONEY PROPERTIES, INC.
EQUAL HOUSING OPPORTUNITY / EQUAL OPPORTUNITY EMPLOYER
FOR DISABILITY ACCESS INFORMATION CALL 617-449-7887 EXT 255
TDD #1-800-439-2370

(6)

Supreme Court, U.S.
FILED
JUN 29 1998
OFFICE OF THE CLERK

No. 97-1748

In the Supreme Court of the United States

OCTOBER TERM, 1997

ALFRED RASO, ET AL., PETITIONERS

v.

MARISA LAGO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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13pp

QUESTION PRESENTED

Whether a housing development plan that sets aside some units for former residents of the area in which the project is located and makes other units available to all others through a lottery imposes a racial classification subject to strict scrutiny.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 63a-83a) is reported at 135 F.3d 11. The opinion of the district court (Pet. App. 22a-62a) is reported at 958 F. Supp. 686.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1998. The petition for a writ of certiorari was filed on April 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1959, as part of an urban renewal project, the City of Boston, Massachusetts took title by eminent domain to a tract of land known as the Old West End. Pet. App. 25a. That action displaced approximately three thousand households. *Ibid.*

In 1991, the Boston Redevelopment Authority (BRA) contracted with a private developer to build a residential development in the Old West End called West End Place. Pet. App. 65a-66a. The agreement between the BRA and the developer contained two terms that mirrored provisions in Massachusetts law. *Id.* at 66a. First, the developer was directed "'to give preference in the selection of tenants'" to families that had been displaced from the area by urban renewal activities. *Ibid.* (quoting Mass. Gen. Laws ch. 121B, § 49 (1986)). Second, the developer was required "'to comply with such other conditions as are deemed necessary to carry out the * * * requirements of federal legislation or regulations under which loans, grants or contributions have been made or agreed to be made to meet a part of the cost of the project.'" *Ibid.* The BRA also required the developer to work closely with former West Enders; toward that end a number of former West Enders formed the Old West End Housing Corporation. *Id.* at 67a.

The developer sought funding from various sources, including the federal government. Pet. App. 67a. The United States Department of Housing and Urban Development (HUD) agreed to fund a grant of $2.5 million for construction, and committed $7 million in rent subsidies for the low-income units in West End Place. *Ibid.* Those funds were contingent upon com-

pliance with the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.* *Ibid.*

The FHA requires HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further" the policies of the Act. 42 U.S.C. 3608(e)(5). Consistent with that mandate, HUD's regulations require applicants for HUD funds to submit an "affirmative fair housing marketing plan." 24 C.F.R. 200.625. Such plans "shall typically involve publicizing to minority persons the availability of housing opportunities regardless of race, color, religion, sex, handicap or familial status or national origin." 24 C.F.R. 200.620. HUD is also subject to a 1991 consent decree that is based on a district court finding that HUD failed to conduct its programs and activities in the Boston area so as to affirmatively further the purposes of the FHA. Pet. App. 67a. That decree provides that the affirmative fair housing marketing plans that are submitted by applicants for HUD funds "shall have as their goal and measure of success the achievement of a racial composition, in HUD-assisted housing located in neighborhoods which are predominantly white, which reflects the racial composition of the City as a whole." *Id.* at 3a-4a. The consent decree also states that "[n]othing herein shall constitute or be construed as requiring a quota." *Id.* at 4a.

Because minorities constituted approximately 41% of the City's population, but only 2% of the former West Enders, HUD concluded that the FHA and the consent decree would not permit it to authorize federal funding if the tenant-selection plan set aside 100% of the new units for displaced West Enders. Pet. App. 68a. The developer, the government agencies, and the Old West End Housing Corporation submitted

the matter to a mediator, who formulated a plan under which 55% of the new units would be set aside for former West Enders, and the remaining 45% of the new units would be made available to all other applicants through a lottery. *Id.* at 68a. The developer, the BRA, and HUD agreed to the mediator's plan, which was adopted by the developer and approved by HUD in 1996. *Ibid.* The Old West End Housing Corporation did not agree to the plan. *Ibid.*

2. In 1996, petitioners, who are four former West Enders and the Old West End Housing Corporation, filed suit in federal district court against the BRA and its director, HUD and its Secretary, the City of Boston and various City officials, and the developer and others associated with it. Pet. App. 70a. Petitioners alleged, *inter alia*, that the tenant selection plan imposed a racial classification, in violation of the Equal Protection Clause. *Id.* at 71a.

The district court dismissed the complaint. Pet. App. 22a-62a. The court held that the complaint failed to state an equal protection claim, because the tenant selection plan did not "provide any 'preference' in the assignment of units at West End Place based on race." *Id.* at 55a.

3. The court of appeals affirmed. Pet. App. 63a-83a. The court held that HUD's conditioning of federal funds for West End Place on the developer's agreement to make some units available to non-West Enders did not embody a racial classification. *Id.* at 72a-76a. The court explained that, while HUD's action reflected a concern about the racial effect of an unlimited preference for West Enders, a racial concern is not equivalent to a racial classification. *Id.* at 72a-73a. The court observed that "[e]very antidiscrimination statute aimed at racial discrimination,

and every enforcement measure taken under such a statute, reflect[s] a concern with race." *Id.* at 73a. That concern with race, the court stated, "does not make such enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause." *Ibid.*

Relying on *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), and *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), the court of appeals noted that a racial classification "normally refers to a governmental standard, preferentially favorable to one race or another, for the distribution of benefits." Pet. App. 73a. The court held that the challenged selection plan did not impose such a racial preference, since "the apartments freed from the statutory preference are made available to *all* applicants regardless of race." *Ibid.* The court found no case requiring the government to show "a compelling interest, or narrow tailoring of remedies, for a condition framed so as to secure *equal* treatment of applicants regardless of race." *Id.* at 74a.

The court concluded that strict scrutiny would apply if HUD had a practice of challenging displaced resident preferences only when they effectively exclude blacks and not when they effectively exclude whites. Pet. App. 75a. The court concluded, however, that petitioners had not alleged dissimilar treatment of that kind. *Id.* at 76a.

Judge Stahl dissented. Pet. App. 79a-83a. Judge Stahl read petitioners' complaint to allege that HUD would not have challenged a statutory preference benefitting a predominantly minority group. *Id.* at 81a. Even accepting the majority's construction of the complaint, however, Judge Stahl would have subjected the plan at issue to strict scrutiny. *Id.* at 81a-

83a. According to Judge Stahl, strict scrutiny was warranted because the curtailment of the preference for West Enders "had the effect of depriving [petitioners] of a benefit and was prompted by the fact that [petitioners] are mostly white." *Id.* at 83a.

ARGUMENT

1. Petitioners contend (Pet. 8-9) that the tenant selection plan for West End Place imposes a racial classification subject to strict scrutiny under *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995). That contention is without merit and does not warrant review.

In *Adarand*, a white subcontractor challenged a federal subcontracting program that authorized additional compensation for contractors who used socially and economically disadvantaged subcontractors and presumed that blacks, Hispanics, Native Americans, Asian Pacific Americans, and other minorities were socially and economically disadvantaged. 515 U.S. at 205-206. The Court noted that the presumption of disadvantage involved a classification "based explicitly on race," *id.* at 213, and it held that such explicit racial classifications must satisfy strict scrutiny when they subject persons of a particular race to "unequal treatment." *Id.* at 224.

The tenant selection plan at issue in this case is not subject to strict scrutiny under *Adarand*. The plan sets aside some units for former West Enders on a lottery basis, and it makes other units available to non-West Enders on a lottery basis. The selection plan therefore explicitly classifies on the basis of West-Ender status, not on the basis of race, and it does not impose a racial preference of any kind. Blacks and whites who are former West Enders have

an equal opportunity to obtain the housing that is set aside for former West Enders, and blacks and whites who are not West Enders have an equal opportunity to obtain the housing that is set aside for non-West Enders. Because the tenant selection plan relies on a race-neutral method of allocating housing opportunities, and does not employ an explicit racial classification that prefers members of one race over the other, the court of appeals correctly concluded that the plan is not subject to strict scrutiny under *Adarand*.

Petitioners contend (Pet. 11-17) that the plan imposes a racial classification, because HUD's objection to extending a West Ender preference to all units was that it would effectively exclude minorities from West End Place and that objection prompted a reduction in the number of units set aside for West Enders. As the court of appeals correctly concluded, that contention incorrectly equates a "racial concern" with a "racial classification." Pet. App. 72a-73a. As the court noted, "[e]very antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect[s] a concern with race," but "[t]hat does not make such enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause." *Id.* at 73a. While the racially exclusionary effect of the West Ender preference triggered HUD's objection to the original plan, the critical point is that the governmental actors responded to that objection by agreeing to a race-neutral selection plan that was designed to secure equal treatment to all applicants regardless of their race. As the court of appeals concluded (*id.* at 74a), no case has subjected such a race-neutral plan to strict scrutiny simply because it was prompted by racial concerns.

Under petitioners' theory, a totally race-neutral selection system—such as the lottery system used in this case—becomes a racial classification subject to strict scrutiny, if it is adopted in order to avoid the discriminatory effects of some other selection system. In the employment setting, that would mean that when a State changes the tests it administers to job applicants, or moves from reliance on written tests to reliance on job performance evaluations, the new race-neutral selection criterion becomes a racial classification subject to strict scrutiny if the change is motivated by a concern about the discriminatory effects of the old system. Similarly, a State is ordinarily free to eliminate its veterans preference and rely on a system of pure merit selection, but if it does so because of the adverse effect of a veterans preference on employment opportunities for women, then its merit selection system becomes a gender-based classification subject to heightened scrutiny. The effort to avoid discrimination and discriminatory effects is not so suspect a purpose that it converts a facially race-neutral selection system into a suspect classification. When, as here, the government uses a race-neutral method of allocating benefits in order to provide equal opportunity to all applicants regardless of race, strict scrutiny does not apply.[1]

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[1] The court of appeals concluded that petitioner's complaint did not allege that HUD had a practice of challenging displaced resident preferences only when they effectively exclude blacks and not when they effectively exclude whites, Pet. App. 75a-76a, and petitioners do not take issue with that assessment here. As the court of appeals noted (*ibid.*), such an allegation of differential treatment would raise different questions from the one presented in this case.

2. Petitioners assert (Pet. 9-10) that the decision below conflicts with the D.C. Circuit's decision in *Lutheran Church-Missouri Synod* v. *FCC*, 1998 WL 168712 (1998). In that case, however, the D.C. Circuit read the FCC regulations at issue to "oblige stations to grant some degree of preference to minorities in hiring." *Id.* at *8. For that reason, the court subjected the FCC regulations to strict scrutiny. *Id.* at *10. Since the tenant selection plan at issue in this case does not in any way require the developer to grant a preference to minorities in housing, and no one has suggested that it does, there is no conflict between *Lutheran Church* and the decision below. Indeed, in *Lutheran Church*, the D.C. Circuit specifically distinguished the First Circuit's decision in the present case on the ground that "HUD's racially neutral housing requirement no more implicated the equal protection guarantee than a nondiscrimination statute like Title VII." *Id.* at *14 n.8.[2]

For similar reasons, petitioners err in asserting (Pet. 10) that the decision below conflicts with *Hopwood* v. *Texas*, 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996) and *In re Birmingham Reverse Discrimination Emp. Lit.*, 20 F.3d 1525 (11th Cir. 1994), cert. denied, 514 U.S. 1065 (1995). In *Hopwood* and *Birmingham*, the government admittedly used race as a factor in allocating a government benefit, and the only question was whether the challenged racial classification satisfied strict scrutiny. *Hopwood*, 78

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[2] The FCC and the United States have sought en banc review in *Lutheran Church*, and have argued that the FCC regulations at issue do not require stations to impose a racial preference in hiring. The D.C. Circuit has not yet acted on the request for en banc review.

F.3d at 938; *Birmingham*, 20 F.3d at 1535-1536. In contrast, the tenant selection plan at issue in this case does not use a racial classification, and nothing in *Hopwood* or *Birmingham* suggests otherwise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 97-1748.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ALFRED RASO, ET AL.,

Petitioners,

v.

MARISA LAGO, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION.

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STATEMENT OF THE ISSUES.

Each of the Respondents have raised new issues in their briefs in opposition: (I) whether the case is moot, (II) whether the statutory right-of-return is at odds with the Supremacy Clause, (III) whether this case is too fact-specific to be capable of repetition, (IV) whether the race neutral lottery is at issue in this case, (V) whether their actions merely reflect "racial concerns," not subject to strict scrutiny, and (VI) whether a right-of-return was created by a state statute.

ARGUMENT.

I. THIS CASE PRESENTS THE COURT WITH A LIVE CONTROVERSY FOR WHICH THE COURTS MAY GRANT EFFECTIVE RELIEF.

A. *There Remains A Live Issue Of Damages To The Displaced West Enders That Renders This Case Not Moot.*

The Respondent Developers argue that "[w]here petitioners have not 'suffered some actual injury that can be redressed by a favorable judicial decision,' no case or controversy exists. (Dev. Br. in Op., at 7). However, this Court has recognized that where there is an unlawful use of racial classification against a party, an injury to that party exists. *See Adarand* v. *Pena*, 515 U.S. 200, 211 (1995).

The Respondent Developers also argue this case is moot because the class was never certified and because "all qualified applicants in the lottery process who identified themselves as former residents of the West End have been offered apartments at West End Place." (Dev. Br. in Op., at 6). Petitioners dispute the accuracy of this claim and note again that offers to participate in a discriminatory housing scheme are not valid offers. Moreover, the Respondents' view of the plaintiff class is not consistent with how the district court viewed the issue of standing. The district court identified two putative classes before it: one, "headed by several former residents of Boston's Old West End neighborhood," and the other consisting of "the Old West End Housing Corporation." (Pet. for Cert., App. at 22a). The court acknowledged that "[t]he applications [] reveal the racial composition of the putative class," as consisting of 308 former West Enders,

identifying named plaintiffs, Alfred J. Raso and Frank Lavine as among the eligible applicants. (Pet. for Cert., App. 32a). Because Raso and Lavine's standing as plaintiffs representing the interests of the putative class was uncontested, the court did not address "the distinct and more difficult issue of organizational standing presented by OWEC." (Pet. for Cert., App. at 38a fn.11).

In *Assoc. Gen. Contractors* v. *City of Jacksonville*, 508 U.S. 656 (1993), this Court ruled that plaintiffs, who were seeking declaratory and injunctive relief, had suffered an injury that was within the jurisdiction of the courts to cure.

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit that it is for another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. *See, e.g. Regents of Univ. Cal.* v. *Bakke*, 438 U.S. 265. The 'injury in fact' element of standing in such an equal protection case is the denial of equal treatment resulting from the imposition of the barrier — here, the inability to compete on an equal footing in the bidding process — not the ultimate inability to obtain the benefit.

Id. at 665. This injury-in-fact has not been resolved and remains a live controversy capable of redress by the courts.

B. *None Of The Housing Offers Made To Petitioners Were Free Of The Taint Of Discrimination Against Them Or The Putative Class.*

In support of their argument for mootness, the respondents invoke self-serving letters written by the defendant Developers (that are not part of the trial record) to the named plaintiffs (Dev. Br. in Op. at 5a-10a). Two of the Petitioners refused to respond to the housing offers, the third is alleged to have asked that his name be taken off the developer's list. Not only were these letters not part of the trial record, but they were written, by a party, six, seven, and ten months respectively, after the adverse decision of the district court and while Petitioners were appealing the unfavorable ruling to the Circuit. These housing offers were conditioned on the very same constitutionally offensive terms as were rejected by Petitioners earlier, and which are the basis of this litigation.

II. THE SUPREMACY CLAUSE IS NOT APPLICABLE.

As the motion court noted, "§ 49(d) [] expressly contemplates that the statute will be administered in a manner consistent with federal law." (Pet. for Cert., App. at 50a). The federal regulation was, in fact, applied in a manner inconsistent with the race neutral mandates of federal law. As the dissent below noted, "quite clearly, defendant's conduct has had the effect of depriving plaintiffs of a benefit and was prompted by the fact that plaintiffs were mostly white." (Pet. for Cert., App. at 83a). Only valid regulations can be supreme under the Supremacy Clause. The HUD regulations

are not valid because their application was based on unlawful racial classifications.

III. Government Action Of The Type In This Case Is Capable Of Repetition.

In their opposition brief, at page 9, BRA argues that the issues in this case are not capable of repetition and therefor not deserving of this Court's attention. In its ruling, the First Circuit declared that a racial classification only exists where the government's action "reserv[es] benefits to a favored race" or where there is "an effort to segregate the races." (Circuit Court's Opinion, Pet. for Cert., App. at 75a). This reasoning is inconsistent with this Court's doctrine that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 273 (1986). The question for this Court is whether the First Circuit was correct in declaring that these practices are not subject to heightened judicial scrutiny.

The First Circuit's ruling also stands for the principle that government may subordinate race-neutral principles to race conscious ones without heightened judicial scrutiny is erroneous. *See Miller* v. *Johnson*, 515 U.S. 900 (1995) (subordinating race-neutral districting principles to racial purpose made districting constitutionally suspect) (slip op., at 15-16).

Given the continuing role of HUD in housing creation across the country, and the role of the City of Boston and the Boston Redevelopment Authority in housing created in the city of Boston and in Massachusetts, along with the uncertainty expressed by the lower court when it said it "sought to decide this appeal based on Supreme Court precedent, as best

we can discern it, recognizing that the case is a difficult and unusual one on the edge of developing law" (Pet. for Cert., App. at 78a), it is hard to see how the argument that the race-based rationale employed by Respondents to deprive the West Enders of housing is incapable of repetition elsewhere.

IV. THE LOTTERY SHOULD NOT BE AN ISSUE IN THIS CASE.

The lottery adopted after the withdrawal of the race-neutral statutory benefits should not be part of this case. It was the race-based decision to withdraw the benefits that the Displaced West Enders sought to have subjected to strict judicial scrutiny. Any discussion of the lottery only serves to obscure the true issue of this case.[1] The lottery has never been challenged by the Petitioners; it is the withdrawal of the statutory benefits that they have always challenged.

Contrary to the suggestions of the defendants, ruling in favor of the Displaced West Enders would not "prohibit 'every antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such statute' because they 'reflect a concern with race.'" (Dev. Br. in Op., at 13, *quoting in part* Circuit's opinion, Pet. App. at 73a). Nor would ruling in favor of the Displaced West Enders bar HUD from preventing racial discrimination in hous-

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[1] The BRA attempts to raise in their appeal, at page 18, footnote 16, an argument that the West Enders may not raise a challenge to the application of the consent decree with this Court. OWEC did not appeal Judge Skinner's denial of leave to intervene because it assented to his reasoning that the case did not determine their rights. (Pet. for Cert., App. at 21a.) They took Judge Skinner's advice and filed a new action. *Id.*

ing patterns. HUD would be free to enforce Titles VI and VIII to address *discrimination* in housing.

V. Defendant's Argument That Actions Based On "Racial Concerns" Are Not Constitutionally Suspect Misstates Both The Nature Of This Case And This Court's Precedents.

HUD attempts to make a distinction between racial concern and racial purpose. (HUD's Br. in Op., at 7). HUD's actions were not based on a mere concern with race, HUD admits that race was the *primary* purpose behind HUD's action.[2] The Circuit's majority acknowledged the "undenied racial motive." (Circuit's Opinion, Pet. for Cert., App. at 72a). This Court has clearly stated that where government's actions are based on a racial purpose they are racial classifications and subject to strict judicial scrutiny. The failure of both the Circuit and Motion courts to apply that level of scrutiny were errors that must be reversed. As this Court wrote in *Miller* v. *Johnson*, "[w]e recognized in *Shaw* that, outside the districting context, statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or objective." *Miller* v. *Johnson*, 515 U.S. 900 (1995) (slip op., at 11-12). The dissent below saw the error and addressed it this way: "it is the plaintiffs' 'personal right to equal protection of the laws,' [*Adarand*] 515 U.S. at 277,

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[2] Although HUD argued in its opposition brief that its actions were not race-based, but merely reflected a concern with race, HUD admitted and the Circuit Court found that "[t]his undenied racial motive" was the driving purpose behind HUD's actions. (Pet. for Cert., App. at 74a).

and not some non-party's interest in competing for that which would be the plaintiffs' but for his or her race, that is constitutionally safeguarded." (Pet. for Cert., App. at 82a).

Despite what some of the other Respondents may ascribe to HUD as their reason for requiring the withdrawal of the benefits from the Displaced West Enders, HUD states the actual reason: "[b]ecause minorities constituted approximately 41% of the city's population, but only 2% of the former West Enders, HUD concluded that FHA and the consent decree would not permit it to authorize federal funding if the tenant-selection plan set aside 100% of the new units for displaced West Enders." (HUD's Br. in Op., at 3).

HUD argues that merely because a decision was "prompted by racial concerns" does not subject it to strict scrutiny. (HUD's Br. in Op., at 7). The dissent did not view HUD's actions so benignly, however, "defendants conduct has had the effect of depriving plaintiffs of a benefit and was prompted by the fact that plaintiffs are mostly white." (Pet. for Cert., 83a). Where the *purpose* is to change the racial group which will benefit from a government action, the urban renewal of the West End, that change is suspect as a racial classification.

VI. Whether Or Not The Statute Created An Absolute Or Conditional Preference Is Irrelevant To This Case.

Defendants assert that since the preference granted by M.G.L. c. 121B, § 49 does not grant an absolute preference, the loss of the preference does not constitute a constitutional injury. Whether of not the preference granted by M.G.L. c. 121B, § 49(c) is an absolute or conditional preference is

irreverent to this Court's analysis. Any modification of the § (c) preference that was based on race must survive review under strict judicial scrutiny. Whether the preference was withdrawn based on the inapplicable consent decree,[3] or on waived HUD regulations, or on statutes, or as an *ad hoc* decision; a benefit was unquestionably redistributed based on race. Whatever the reason, it must survive strict judicial scrutiny.

A. *The Statute Created a Right of Return.*

Respondent BRA argues that, "[t]he Massachusetts statute most assuredly does not create a 'right of return' for displacees of urban renewal, and, hence, there is no right for this Court to vindicate. (BRA Br. in Op., at 10). This is a curious position for the Respondents to take since, in the case of *Charles River Park, Inc.* v. *Boston Redevelopment Authority*, Mass. App., C.A. No. 88-P-1008 (Dec. 5, 1988) the BRA argued that the statutory obligation on Charles River Park (CRP), Respondent Developers' predecessors, rose to the level of a trust: "[i]t may be that most of the original West End residents no longer are able or willing to return there . . . CPR should not be allowed to benefit from the fact that its failures have extended for an entire generation. Second, to the extent that the original residents are no longer available, the BRA can consider the need of current low-and-moderate-income residents of Boston as the next most likely beneficiaries. . . . In this case, CRP was in essence given the rights in

[3] See section IV of (Pet. for Cert., at 24-30), discussing this Court's holding in *Martin* v. *Wilks*, 490 U.S. 755 (1989).

trust to the West End." Moreover, in *McQueen* v. *Druker*, 438 F.2d 781, 784 (1st Cir. 1971) the Circuit Court characterized the obligation imposed by the statute this way:

> Landlord are, in return for an assured consideration, and subject to certain oversight, helping the state realize its specific priority objective of providing for urban renewal displacees [of the West End] and its more general goal of providing good, quality housing at rents which can be afforded by those of low and moderate income.

The dissent noted the statutory "full preference,"

> It is important to note that there is no indication that the benefit originally given (i.e. the full preference) was given to plaintiffs because they were predominantly white; rather, the preference was given because plaintiffs were ousted from their homes.

(Pet. for Cert., App 82a fn.9).

CONCLUSION.

The notion that families forcibly displaced by urban renewal may be denied a statutory right-of-return to housing because those displaced were predominantly white and is not subject to strict scrutiny is constitutionally offensive and is at odds with this Court's controlling precedent. For the forgoing reasons, Petitioners respectfully pray that Respondents' suggestion of mootness be denied and that Certiorari be granted.

Respectfully submitted,

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